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Supreme Court, U.S.
FILED
NOV 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

AACON AUTO TRANSPORT, INC.,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether petitioner's due process rights were violated when an Administrative Law Judge sitting in a quasi-criminal proceeding was removed by an agency against his will, and without any evidence or allegations of wrongdoing?

2) Whether petitioner's right of free speech was violated by the second Administrative Law Judge's gag order prohibiting contact with witnesses without evidence of wrongdoing?

3) Whether petitioner's due process rights were violated when the punishment was broadened beyond the scope of notice, after the close of the record and initial decision; and

4) Whether statutory provisions "automatically" terminating investigative proceedings were applicable to the instant case?

TABLE OF CONTENTS

	Pages
Questions Presented.....	
Table of Authorities.....	ii-iv
Opinions Below.....	2
Jurisdiction.....	2-3
Statutes Involved.....	4
Statement of Case.....	4-7
Reasons for Granting Writ.....	7-49
Appendices.....	
Opinion of the Court of Appeals for the District of Columbia	A1-17
Denial of AAACon's Suggestion for Rehearing	B1
Denial of AAACon's Suggestion for Rehearing en banc	B2
Decision of Interstate Commerce Commission (1984)	B3-122
Decision of Interstate Commerce Commission (1980)	B123-145
Order of Interstate Commerce Commission (1976)	B146-149
Statutes	C1-10
Constitutional Provisions	D1
Miscellaneous	E1-6

TABLE OF AUTHORITIES
CASES

B.J. Mc Adams, Inc. v. ICC, 698 F.2d 498 (D.C. Cir. 1983)

Borg-Johnson Electronics, Inc. v. Christenberry, 169 F.Supp 746 (S.D.N.Y. 1959)

Bradley v. School Board of Richmond, 416 U.S. 696, (1974)

Brown v. General Services Adminstration, 507 F.2d 1300, (2nd Cir. 1974)

Burlington Northern, Inc. v. United States, 679 F.2d 915 (D.C. Cir. 1982)

Burlington Northern Railroad v. ICC, 679 F.2d 934 (D.C. Cir. 1982)

Carl Subler Trucking Inc., 103 MCC 307 (1966), aff'd Carl Subler Trucking v. United States, 315 F.Supp 971 (S.D. Ohio 1970)

Chicago, B. & Q. Ry. Co. v. New York, S.T.W. Ry. Co, 318 ICC 180 (1962)

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D.C. Federation of Civic Assns. v. Volpe, 459 F.2d 1231 (D.C. Cir. 1972), cert denied, 92 SCt 1290 (1972).

Drug Package Inc., v. NLRB, 570 F.2d 1340 (8th Cir. 1978)

Eagle Motor Lines, Inc. v. ICC, 545 F.2d 1015 (5th Cir. 1970)

Jaffe & Co. v. SEC., 446 F.2d 337 (2d Cir. 1971)

Kroeger v. Ball, 497 F.2d 702, (4th Cir. 1974)

McClean-Behn Steel Erectors, Inc. v. OSHA, 608 F.2d 580 (5th Cir. 1979)

In Re Monsen, 74 F.2d 411, (7th Cir. 1934)

National Freight, Inc. - Ext. Georgia to Eight States, MC - 2860 (Sub-No. 151) 130 MCC 158 (1978)

Pillsbury Co. v. FTC, 354 F.2d 952, (5th Cir. 1966)

Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, (1953)

Reserve Mining Co. v. Lord, 525 F.2d 181 (8th Cir. 1976)

In Re Ruffalo, 390 U.S. 544 (1968)

Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055 (1st Cir. 1981)

Stuart Trucking Company, Inc. - Transfer, 127 MCC 793 (1982)

Tractor Training Service v. FTC, 227 F.2d 420, (9th Cir. 1955), cert. denied, 350 U.S. 1005 (1956)

Turner v. United States, 410 F.2d 837, (5th Cir. 1969)

U.S. v. Haughton, 413 F.2d 736 (9th Cir. 1969)

United States v. Lindsay, 346 US 568, (1953)

Watkins Motor Lines v. ICC, 641 F.2d 1183 (5th Cir. 1981)

CONSTITUTIONAL PROVISIONS

AMENDMENT I
AMENDMENT V

STATUTES

5 U.S. Code Section 556 (b)
5 U.S. Code Section 556(c)(6)
28 U.S. Code Section 1254
28 U.S. Code Section 2101
28 U.S. Code Section 2321
28 U.S. Code Section 2350
49 U.S. Code Section 10322
49 U.S. Code 10925
49 U.S. Code Section 10934(c)
49 U.S. Code Section 11701(c)

MISCELLANEOUS

49 C.F.R. 1111.1(a)
49 C.F.R. 11113.3(a)(1)(v)
49 C.F.R. 1113.3(a)(1)(ix)
49 C.F.R. 1113.9

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. _____

AACON AUTO TRANSPORT, INC., Petitioner

v.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

AACON AUTO TRANSPORT, INC.,* the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District

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*Related Companies:
Auto-Overseas, Ltd.
Driveaway Corp.
North American Transport Company, Inc.
Auto Caravan, Inc.

**Auto Driveaway Corporation appeared as Intervenor in the Court below.

of Columbia Circuit entered in the above-entitled case on June 10, 1986.

OPINIONS BELOW

The jurisdiction of the Court of Appeals for the District of Columbia Circuit was invoked under 28 U.S. Code Section 2321.

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 792 F.2d 1156 and is printed in Appendix A hereto, infra, pages A1-17. The denials of petitioner's suggestions for rehearing and rehearing en banc have not been officially reported to date. They are printed in Appendix B hereto, infra, pages B1-2.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit (Appendix A, infra, pages A1-17) was entered on June 10, 1986. A timely

petition for rehearing and rehearing en banc was denied on August 12, 1986 (Appendix B, infra, pages B1-2). The jurisdiction of the Supreme Court is invoked under 28 U.S. Code Section 1254.

STATUTES INVOLVED

5 U.S. Cose Section 556(b)
5 U.S. Code Section 556(c)(6)
28 U.S. Code Section 1254
28 U.S. Code Section 2101
28 U.S. Code Section 2350
49 U.S. Code Section 10925
49 U.S. Code Section 10322
49 U.S. Code Section 10934(c)
49 U.S. Code Section 11701(c)

STATEMENT OF CASE

In 1978, the Interstate Commerce Commission (Commission) assigned Administrative Law Judge (ALJ) Benice to hold an investigative proceeding to determine whether AAACon had willfully violated a 1976 cease and desist order. The notice reopening the proceeding provided that in the event that a willful violation of the cease and desist order

was found, AAACon's Sub 1 certificate might be revoked. During the course of the proceeding, the Commission's prosecuting arm, OCCA, admitted on the record that it had willfully misrepresented to the sitting judge (ALJ Benice) and to AAACon facts concerning the existence of exculpatory documents, and that it had willfully covered-up the disappearance of the documents. The ALJ decided to hear, as part of the proceeding, the issue of OCCA had conducted an investigation that was impartial or had denied AAACon's rights thereto.

Sixteen days of proceedings were conducted under modified procedure as authorized by Commission regulations. ALJ Benice received into evidence OCCA's entire affirmative case in that period of time. ALJ Benice entered an initial decision accepting an offer of settlement

favorable to AAACon. The Commission reversed ALJ Benice's decision. Moreover, it removed him from the case and required the matter to be assigned to another ALJ on remand.

In January 1981, over a year after the Commission removed ALJ Benice, the case was assigned to ALJ Sarbacher. The proceedings thereafter involved 63 days of additional hearings. ALJ Sarbacher refused to admit or consider evidence on the issue of OCCA's failure to conduct an impartial investigation. ALJ Sarbacher also prohibited AAACon from contacting witnesses by discovery or otherwise.

Judge Sarbacher's initial decision revoked AAACon's Sub 1 certificate. He then amended his decision to revoke all of AAACon's other certificates.

The Commission issued its final decision on August 7, 1984, more than four years after the investigative

proceeding had begun.

Aacon petitioned the United States Court of Appeals for the District of Columbia for review of the Commission's decision. The Court of Appeals denied the petition, as well as Aacon's suggestions for rehearing and rehearing en banc.

REASONS FOR GRANTING WRIT

THE REMOVAL OF JUDGE BENICE VIOLATES THE INDEPENDENCE OF THE ADMINISTRATIVE JUDICIARY, IS UNSUPPORTED BY LAW, AND MUST BE PROPHYLACTICALLY REJECTED

Whether an administrative agency can remove a sitting administrative law judge without any evidence of wrongdoing and without a specific finding of wrongdoing is an issue of first impression. Research reveals no other court decisions dealing with this matter.

The removal of ALJ Benice without allegations or evidence of wrongdoing lacks statutory authority and flies in

the face of the Administrative Procedure Act. That Act provides the sole procedure by which an ALJ may be involuntarily removed. An ALJ may be removed from a proceeding where the Commission assesses the bias of the ALJ based upon an affidavit of personal bias or other disqualification. 5 U.S.Code Section 556(b). Section 556(b) is designed to prevent actual or apparent manipulation of, or interference with, selection of administrative judges by an agency.

The Court of Appeals acknowleged that neither the Commission nor any party alleged bias or wrongdoing on the part of Judge Benice.

The Commission's sole rationale in its 1980 decision removing Judge Benice was:

> The course of events at the sixteen days of hearing already held and the hearing officer's apparent

involvement in the settlement negotiations are compelling argument in favor of reassigning this proceeding to another ALJ.

The "course of events" was never defined. The sole articulated charge against Judge Benice was that he participated in settlement discussions. However, the Administrative Procedure Act not only authorizes, but encourages, Administrative Law Judges (unlike district court judges) to preside at settlement conferences. 5 U.S. Code Section 556(c)(6).

Indeed, the Commission's regulations authorize Administrative Law Judges to "hold conferences for the settlement and simplification of issues." 49 C.F.R. 1113.3(a)(1)(ix).

As to the argument raised for the first time on appeal that the sixteen days of modified procedure were improper, the Commission's regulations specifically

authorize the Administrative Law Judges to develop procedures; for example, permitting the submission of affidavits in proof of the affirmative cases of the parties, as Judge Benice ordered. 5 U.S. Code Section 556(c)(5); 49 C.F.R. 1113.9 and 1113.3(a)(1)(v). Indeed, the submission of affirmative cases on documents is a procedure which the Commission has adopted and encouraged in most proceedings it conducts today. Within the sixteen days, OCCA had presented its full direct case, and the Judge had practically completed review thereof and of all objections by Aacon to the submission of those witnesses' statements. In other words, the Commission's direct case was completed.

Although the Court of Appeals has acknowledged that there was no wrongdoing by Judge Benice, a misreading of the facts by the Court of Appeals requires a

brief digression. The Court of Appeals found that the Commission had discretion to remove the Judge, reasoning that it was justified because of "ALJ Benice's proven inability to cut through AAACon's dilatory tactics" and move the proceedings along.* The Commission never made any such allegation.

Simply stated, the Court of Appeals has held that an administrative agency may remove a judge without charging him with wrongdoing, without obtaining any affidavits in support of the charge, and without

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* It should be noted that ALJ Benice was able to make an initial decision after only 16 days of hearings, while ALJ Sarbacher required 63 days of hearings. ALJ Benice's well-organized and efficient approach to the proceedings manifests anything but a "proven inability" to expedite the proceeding, especially when one considers that he was faced with the OCCA's acknowledged misrepresentations and tactics during the proceeding. When Judge Benice required all sides to reduce the witnesses' direct cases to written verified statements, neither OCCA, nor intervenor Auto Driveaway nor AAACon objected to this procedure. In fact, the procedure was used diligently by all parties to prepare and reduce the length and time of the case. The testimony of (cont'd)

giving him an opportunity to conform his conduct to that required by the agency. If this is so, then the principle that administrative agencies may not tamper with the ruling of Judges is belied. Courts do not require proof of harm in such circumstances, recognizing, rather, the "right" to the appearance of impartiality." Pillsbury Co. v. FTC, 354

(Con't) twenty-seven witnesses was thus submitted into the record by OCCA through one OCCA witness. Judge Benice then gave AAACon an opportunity to make objections to portions of direct testimony such as irrelevancy and prejudice, and he made his rulings thereon.

Accordingly, the Commission's statement--that in sixteen days only one witness was heard--was misleading. Rather, one witness sponsored twenty-seven verified statements. All motions, all preliminary proceedings and entire affirmative direct testimony for twenty-seven witnesses was placed in the record.

An unexplained year-and-a-half delay by the Commission in assigning the subsequent ALJ is a further example of the Commission's "dilatory tactics." In fact any dilatory tactics are attributable to the Commission's prosecutor, not to Aacon. It was the OCCA which refused to comply with the ALJ's discovery orders, causing needless delay. OCCA engaged in other unlawful delay tactics more fully set forth elswhere in this petition.

F.2d 952, 964 (5th Cir. 1966); D.C. Federation of Civic Assns v. Volpe, 459 F.2d 1231, 1246 (D.C. Cir. 1972), cert. denied, 92 S.Ct. 1290 (1972).

While the removal of an Administrative Law Judge is an issue of first impression, the Supreme Court addressed the matter in U.S. v. Tucker Truck Lines, 344 U.S. 33, 38 (1952), indicating in dicta that no showing of harm would be necessary to invalidate an administrative agency decision where a party objected to the improper appointment of a judge.

5 U.S. Code Section 556(b) is, and must be, the exclusive avenue by which to remove ALJs.

The replacement process engaged in by the Commission violates every concept of administrative judicial independence. In Borg-Johnson Electronics, Inc. v. Christenberry, 169 F.Supp. 746, 754 (S.D.N.Y. 1959), the Court rejected a

similar rationale to the effect that an agency had "authority to assign administrative law judges to various agency proceedings and to change those assignments at any time." It was this latter rationale which was the Commission's sole basis for removal of Judge Benice in the case below. The Court in Borg-Johnson Electronics, Inc. stated:

> ...such virtual nullification of one of the most important provisions [selection of hearing examiners] is not to be countenanced in the absence of express congressional mandate. Cf. Shaughnessy v. Pedreiro, 349 U.S. 48 (1955). (bracketed language added)

Prior to the instant case, the Interstate Commerce Commission had recognized that removal of judges would severely and improperly interfere with due process. National Freight, Inc.-EXT. Georgia to Eight States, MC-2860 (sub-no.151) 130 MCC 158 (1978). In Chicago, B & Q. Ry. Co. v. New York, S. & W. R.Y.

Co. 318 ICC 180 (1962) wherein the Commission stated:

> ...any manipulation of assignments designed to interfere with, or having the effect of interfering with or influencing, the independence of the examiner in the performance of his duties or the exercise of his discretion as a hearing officer, would run counter to the spirit and purpose of the A.P. Act.

Id. at 183.

The Court of Appeals below erred in relying on dicta in Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 139-40 (1953) to find that the Commission has unfettered discretion to remove ALJs. Ramspeck was a proceeding involving the classification of ALJs solely for purposes of fixing their salaries, not removal of a sitting judge determining a quasi-criminal proceeding. In Re Ruffalo, 390 U.S. 544, 551 (1968). Unlike Ramspeck, the instant involves the serious issue of judge-tampering and due process. The Ramspeck "discretion" to

classify for purposes of compensation does not create a standard by which agencies may remove sitting judges.

Furthermore, even if the Commission had the discretion to replace an ALJ, the criteria enunciated by the Court of Appeals would place the burden on petitioner to show an abuse of discretion. This standard is impossible to meet. The Court below required: 1) that Aacon demonstrate that it was the Commission's intent or the effect of its action to interfere with the independence of the ALJ; or 2) that Aacon demonstrate that the switch was prejudicial to Aacon.

Aacon has presented, to the limits of its ability, evidence from the record that it suffered clear and specific harm as a result of the ALJ reassignment. Examples of prejudice to Aacon include that ALJ Sarbacher foreclosed a

development of number of issues that had been heard by Judge Benice (for example, Judge Sarbacher refused to hear to hear evidence of OCCA's misdeeds); that Judge Sarbacher imposed a gag order on Aaacon, prohibiting it from contacting (much less hearing discovery of) witnesses, in violation of Aaacon's fundamental rights of free speech and due process; and that he limited Aaacon's presentation of its case by ordering Aaacon to submit the direct testimony of its witnesses by written summary, while permitting OCCA witnesses to testify orally, which not only limited Aaacon's presentation of the case, but also created a distorted view of each witness' credibility.*

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*Aside from the misrepresentations heretofore discussed the other, frequent attempts by OCCA to derail the proceedings before Judge Benice are matters of record. For example, OCCA misrepresented to Judge Benice that Aaacon had issued documents containing ficticious names--a charge that Aaacon had to spend a tremendous amount of time and money disproving through exhausted discovery -- ultimately leading (cont'd)

Judge Benice alone observed the conduct of OCCA regarding investigations, discovery and delay.

Judge Sarbacher, unlike Judge Benice, repeatedly denied all of Aacon's requests for discovery. Unlike Judge Benice, Judge Sarbacher, after permitting a few of Aacons' minor witnesses to

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(con't) to a demonstration that there was no misrepresentation by Aacon and that no "fictitous names" were at issue. What had actually occured was that one of Aacon's pleadings contained some mispelled names. An OCCA investigator advised OCCA's counsel that he knew these were merely mispellings. Nevertheless, OCCA in subsequent pleadings accused Aacon of submitting "ficticious names."

On another occasion, OCCA's attorney accused Aacon's counsel of stealing government records, which records subsequently turned out to have been in OCCA's exclusive possession at all times.

Moreover, time and again OCCA refused to comply with the orders of Judge Benice regarding discovery, requiring endless motions by Aacon and endless orders by Judge Benice for Aacon to obtain discovery.

The foregoing are some of the actions of OCCA to divert attention and waste the energy and money of Aacon, and to delay a determination by Judge Benice of the merits of the case.

testify orally, required Aacon to submit all of its major witnesses' direct testimony in writing while permitting all of the OCCA witnesses' direct testimony to be oral. Accordingly, Judge Sarbacher's statement that he tended to believe the credibility of OCCA's witnesses, as compared to Aacon's, was predicated on procedures which inherently biased him against Aacon and which created a situation in which the bench's first impression of Aacon's witnesses was through searing, often sarcastic, cross examination. No opportunity for Aacon's witnesses to first establish their credibility was offered. This constituted a substantial denial of Aacon's opportunity to defend itself. It is further significant because determinations of credibility and demeanor made by an administrative law judge are not only important, but are

binding on the agency. First Federal S & L Assn et al, v. Fed. Home Loan Board, 426 F. Supp. 454, 457 (W.D.Ark 1977).

For example, Judge Benice stated regarding OCCA's actions concerning the missing files. "I am aware of what is taking place. I have watched it. I am the one who told him (OCCA's attorney Robbins) how serious I was about this."

Further, Judge Benice indicated that he would hear testimony to the effect that OCCA had made threats to Aacon to obtain a "hanging judge" in the case. Despite OCCA's harranguing of Judge Benice, he refused to remove this issue or the issue of whether OCCA had threatened Aacon or its counsel or had made ethnic slurs at them. Judge Benice stated on the record that he would permit development of an inquiry into these issues.

Judge Benice, who personally saw and heard these events, were removed.

The Court of Appeals' first standard places an unreasonable burden on Aacon in requiring it to prove the Commission's "intent". Rather, a rule prohibiting the removal of judges except for demonstrated good cause under the provisions of the Administrative Procedure Act must be applied prophylactically. At a minimum, the burden should be placed upon the Commission to demonstrate by clear and convincing evidence that its intent was not to interfere with the independence of the ALJ or otherwise deprive petitioner of a fair hearing.

Aacon's case is also distinguishable from Tractor Training Service v. FTC, 227 F.2d 420, 423 (9th Cir. 1955), cert. denied, 350 U.S. 1005 (1956), from which the Court of Appeals drew its criteria of requiring a demonstration of prejudice.

In Tractor Training Service, the first ALJ was not removed involuntarily, and most significantly, the petitioner therein did not contend that there was any prejudice.

Can this Court say with any certainty that the second judge's decisions were not colored by the intimidating actions of the Commission in removing ALJ Benice?

The Commission should also be required to demonstrate that no alternative to dismissing the judge existed. Contrary to established procedures, the Commission did not even request that Judge Benice alter his approach or methods.*

As to the Court of Appeals' requirement

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*Compare Reserve Mining Co. v. Lord, 525 F.2d 181, 185 (8th Cir. 1976), wherein the 8th Circuit repeatedly afforded Judge Lord opportunities to conform his conduct of a trial in accordance with judicial standards, and wherein removal did not occur until after those opportunities had been given.

that AAAcon prove prejudice from the removal, the Court of Appeals recognized that AAAcon could not prove prejudice, stating: "Indeed, Aaacon can never even know for sure how the first ALJ would have ruled..." In such circumstances, where the question arose as to what might have occurred had the revocation proceeding been properly conducted, this Court has reversed the decision of the Court below. In Re Ruffalo, 390 U.S. 544, 551 (1968). Nor does the Court of Appeals define what "prejudice" may encompass.

Such rationale by the Court below is a syllogism. It requires a party aggrieved by the removal of a judge to prove that the new judge committed reversable error. If that were the standard, then the appellant could never be heard to complain about the removal itself because the wrongful acts of the

second judge (such as prejudice or denial of due process) would be grounds for reversal without consideration of the wrongful removal itself. Such a rule, in effect, would always exclude any court's consideration of agency removal of judges.

The Court of Appeals' decision permits the agency to subject an accused to as many dress rehearsals before different ALJs as the agency needs to win its case.

Accordingly, it is respectfully submitted that the Court grant a writ of certiorari to permit more extensive briefing and argument of this significant issue of first impression.

THE COURT OF APPEALS MISCONSTRUED 49 U.S.CODE SECTION 11701(c), IGNORING THE CLEAREST CONGRESSIONAL MANDATE WHICH AUTOMATICALLY TERMINATED THE PROCEEDING

The interpretation of 49 U.S. Code Section 11701(c) is also an issue of first

impression. By this statute, effective July 1, 1980, Congress required the Commission to "automatically" dismiss revocation proceedings not completed three years after they were initiated. The instant proceeding was commenced February 15, 1978. Three years after the proceeding began, Aacon moved to dismiss the proceeding and its motion was denied. Subsequently, three years after the statute was enacted, Aacon again moved to dismiss the proceeding and its motion was denied. The Commission finally rendered a decision in August 1984, six years after commencing the proceeding and four years after the passage of the statutory limitation. This statute is the only legislation governing the revocation proceeding at issue herein.

Some provisions of the Motor Carrier Act do not provide any sanctions for failure to conform to time periods (see,

e.g., 49 U.S. Code Section 10934(c)). Other provisions confer upon the Commission discretion to extend time periods (see, e.g., Section 10322). However, Congress specifically prohibited any discretion to the Commission to extend time under 11701(c). Section 10322 states that discretion to extend time does not apply to the following sections of this subtitle... **11701(c)...**"

The Court of Appeals has ruled that the statute did not apply in this case. Recognizing that the law in effect at the time a decision is made is the law that applies, Bradley v. School Board of Richmond, 416 U.S. 696, 711 (1974), the Court of Appeals nontheless found that Aacon's situation was an exception to the rule. In other words, the Court of Appeals' decision would permit proceedings

initiated prior to July 1, 1980 to go on and on eternally.

The Court of Appeals' decision ignores Congress' unusual use of the emphatic and unequivocal word "automatic" in requiring the termination of proceedings to which the statute is to be applied. Congress could not have made its intent clearer unless it added "and we mean it." Yet it is the application of an automatic termination that the Court of Appeals challenged -- finding instead some discretionary leeway because the Court of Appeals speculated that proceedings might be brought again. The Court of Appeals failed to recognize that double jeopardy would preclude another quasi-criminal proceeding on the same evidence.

Moreover, no such discretion to extend the automatic deadline was contemplated or permitted by Congress.

The legislative intent of Congress is clear from the face of the statute. The reinterpretation by the Court of Appeals constitutes a usurpation of the legislative function, and ignores the clearly stated congressional intent.*

The Court of Appeals' decision also takes issue with the absence of discretion, finding that the automatic termination of proceedings might create a diseconomy. However, such a determination is solely within the authority of Congress. The Court of Appeals articulated a new exception based

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*On March 24, 1980, the Senate Committee issued its report, which did not adopt Chairman Gaskin's request for a limited savings clause, nore did the legislation as finally enacted, have such a clause. If the court below is correct in its assertion that the sunset legislation provisions of Section 11701(c) do not apply to cases pending on July 1, 1980, then the result would be that Congress had created two distinct classes of proceedings in passing section 11701(c) -- a) those commenced prior to July 1, 1980, which according to the Commission's interpretation (cont'd)

upon a redefinition of "manifest injustice"; i.e. that since the Court believed the Commission could start the proceeding over, this would be a waste of administrative economy.

Such a rationale is neither "manifest injustice" as that standard was articulated in Bradley v. School Board of Richmond, 416 U.S. 696, 711 (1974), nor is it a function of a court to replace its view for that of Congress.

Even where a change in the law cuts off access to courts, a "manifest injustice" is not deemed to exist.**

The concept of "manifest injustice" has been previously limited to those situations in

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(cont'd) could go on indefinitely. Such an artificial division of cases would be contrary to the stated intent of Congress to provide "all regulated carriers with a like guarantee to the end of formal investigations within a three year period", and to the assertion in the Senate Committee Report above-quoted that the provisions of 11701(c) apply to "any formal investigative proceeding which is not concluded by the Commission within three years".

**See United States v. Lindsay, 346 U.S. 568, 571 (1953): "In this situation it seems better to leave this (cont'd)

which a party was precluded from presenting any evidence because of the operation of a statute of limitations retroactively. In Brown v. General Services Administration, 507 F.2d 1300, 1306 (2d Cir. 1974), the Court found no manifest injustice in applying legislation limiting access to the courts retrospectively where a party against whom the limit applied had notice of its provision and an opportunity to take measures to comply with the time. Similarly, in the case at bar, the Commission had notice of the time limitations and an opportunity to complete the hearings. Even if the statute is read to

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*(cont'd) statutory problem with Congress rather than for us to stretch the word 'accrued' beyond its ordinary meaning"; and Kroeger v. Ball, 497 F.2d 702, 706 (4th Cir. 1974): "retrospective application is appropriate when the statute 'evinces a change of policy' arising out of consideration that applies with the same force to all cases." Accord, U.S. v. Haughton, 413 F.2d 736 (9th Cir. 1969); Turner v. United States, 410 F.2d 837, 842 (5th Cir. 1969); In Re Monsen, 74 F.2d 411, 412 (7th Cir. 1934).

the benefit of the Commission (i.e., running from 1980 rather that 1978), the Commission exceeded the time period. The statute does not preclude the litigation of a proceeding; it only limits its duration to ensure that the Commission's ability to harass and burden certificate - holders is limited. This was the congressional intent. Exasperated by years of Commission delays and bureaucratic red tape, Congress used clear and emphatic language. Accordingly, the proceeding was required to have terminated after three years. The Commission had notice of the statute and sufficient time to complete the proceedings. The Commission's delays in this case are unexplained and inexcusable.

The statutory language "automatic dismissal" is so emphatic as not to require an analysis of the legislative

history. However, the legislative history demonstrates beyond doubt what Congress had in mind. In the hearings leading to the enactment of this provision, the Commission, per Chairman Gaskins, sought to have a "savings clause" inserted into the statute so that it would not have a retroactive effect to foreclose proceedings over three years old on the date of enactment (July 1, 1980). Even Chariman Gaskins did not seek to insulate pending proceedings which were not then three years old from the application of the three-year cut-off.

Hearings Before the Full Committee on Surface Transportation or the Committee on Public Works and Transportation, House of Representatives, 96th Cong., 2d Sess. (HR6418), p. 1107 of Hearing, March 6, 1980; also, as to Senate Bill, at p. 1110. Both the Senate and the House rejected the savings

clause proposed by Chairman Gaskins.

Moreover, the cases relied upon by the Court of Appeals to avoid retroactive application of the cut-off statute to pending administrative proceedings do not support its position. In Watkins Motor Lines v. ICC, 641 F.2d 1183 (5th Cir. 1981), the Fifth Circuit specifically noted that the Commission had rendered its decision prior to the enactment of the Motor Carrier Reform Act of July 1, 1980. Curtis, Inc. v. ICC, 669 F.2d 648 (10th Cir. 1982), also involved a case in which the Commission's final decision had been rendered before July 1, 1980 (the date of enactment of the statute). Finally, Burlington-Northern, Inc. v. United States, 679 F. 2d 915 (D.C. Cir.

1982) and Burlington Northern-Railroad v. ICC, 679 F.2d 934 (D.C. Cir. 1982), did not involve the Motor Carrier Act of 1980, but rather the Staggers Act. No request for a savings clause applicable to the Staggers Act was made by the Commission and rejected by Congress, contrary to the circumstances surrounding the enactment of the Motor Carrier Act of 1980, applicable herein.

Finally, the Court of Appeals' finding that application of the automatic termination statute would be "disruptive" is erroneous. The Court of Appeals suggested that a dismissal order would not affect the Commission's authority to enforce the 1976 cease and desist order, and speculated that the Commission would then start up another investigation.

Even if the Commission could renew the proceedings on the same evidence (which Aacon asserts the Commission may

not, because of double jeopardy), the Court should not base its decision upon speculation about how one of the parties may react in the future, when Congress has so clearly spoken. Nor does the Court explain how termination of the proceedings would be "disruptive to the transportation system."

Accordingly, it is respectfully submitted that the Court grant a writ of certiorari so that this significant issue may be more extensively briefed and argued.

THE COMMISSION REVOKED ALL OF PETITIONER'S CERTIFICATES WITHOUT GIVING PETITIONER ACTUAL OR CONSTRUCTIVE NOTICE THAT THEY WERE AT RISK

As the Court of Appeals recognized, the Commission's 1978 order instituting revocation proceedings referred only to Aacon's 1966 Sub-No.1 certificate as subject to revocation. Aacon received no notice until after the close of the

record that its other certificates, issued subsequent to the commencement of the investigation proceeding, might be cancelled if Aacon's Sub-No.1 certificate were to be revoked.

The Court of Appeals decision avoids the issue of actual notice by citing the proposition that flawed notice may be overcome if the actual conduct of the rule-making provides notice.

The Court of Appeals found that the actual conduct of the proceeding provided notice that all of Aacon's certificates were at stake. This finding is demonstrably erroneous. First, the Commission's formal rulings during the course of the proceeding clearly declared that it was not considering the other certificates, as more fully discussed below.

Second, the actual conduct of the proceeding herein provided no notice in

fact. Indeed, the Commission's statements repeatedly confirmed that the other certificates were not involved. Not even the ALJ realized that the proceeding was intended to encompass all of the certificates. His initial decision was directed to only the Sub-No.1 certificate. He amended his decision on the subsequent prompting by the OCCA to revoke all of Aacon's certificates.

The following facts were not discussed or considered by the Court of Appeals:

1. Counsel for OCCA specifically stated in cross-examining applicant's national manager that applicant could continue in its trucking operations under its Sub 8x certificate even if its "driveaway certificate" (Sub-No.1) was terminated.

2. Intervenor Auto Driveaway had petitioned the Commission on no less than three occasions during the course of the investigative proceeding to have all of Aacon's certificates made part of the proceedings, and each petition by Auto Driveaway was formally denied by the Commission. In none of these denials did the Commission state or suggest that the subsequent certificates could be revoked in the proceeding here on appeal.

3. All of the evidence concerned only the Sub-No.1 certificate (driveaway of automobiles). No evidence of violations of other certificates was cited.

4. None of the evidence in the proceeding below concerned activities authorized by the other certificates (e.g., trucking of automobiles and the transportation of motor vehicles other than automobiles).

5. A 1973 proposed order, the sole basis for the Court of Appeals' finding that the appellant had constructive notice, merely stated that in the future a constructive proceeding could be conducted which might (using the word "may") involve subsequently issued certificates. But more significantly, the Commission itself, in issuing its final 1976 cease and desist order, rejected this language and substituted its own language that in future proceedings only the Sub-No.1 certificate only would be subject to revocation. (See Appendix B). Even if the 1976 order of the Commission were deemed to adopt certain portions of the 1973 proposed order, clearly where the 1976 order of the Commission itself supercedes a 1973 proposed, non-binding order, that 1976 language must be recognized as operative.

6. Finally, the 1978 order, reopening the proceedings here on appeal, specifically recited only that the Sub-No.1 certificate was subject to revocation.

In light of the foregoing facts, Aacon received neither actual nor constructive notice that certificates other than its Sub.1 certificate were at risk.

Moreover, the Court of Appeals decision is in conflict with decisions of the Supreme Court and that of other Circuits. For example, In Re Ruffalo, supra, concerned disciplinary proceedings removing a license:

> These are adversary proceedings of a quasi-criminal nature ...they become a trap when, after they are under way, the charges are amended on the basis of the testimony of the accused...how the charge would have been met had it been originally included in those leveled against the petitioner ...no one knows. 390 U.S. at 550-51.

The Court of Appeals failed to recognize that a strict standard is required in this quasi-criminal proceeding. In Re Ruffalo, supra. See 49 C.F.R. 1111.1(a) (requiring that a complaint in a revocation proceeding "contain a detailed statement of the relief requested").

The decision by the Court of Appeals herein also conflicts with many Circuit Court decisons. In Jaffe & Co. v. SEC., 446 F.2d. 337 (2d Cir. 1971), the Second Circuit held that no sanction against a separate license could be imposed without specific prior notice that the particular license was subject to suspension and revocation:

> Indeed, although the potential for derivitive sanctions was of course inherent in the facts of the case from the outset, the Division apparently never suggested that the Commission actually rely on Section 15(b)(5)... until it made the suggestion in a brief filed with the examiner after the conclusion of the hearing before him...a respondent may not

reasonably be expected to defend itself against every theory of liability or punishment that might theoretically be extrapolated in a complaint or order, if one were to explore every permutation of fact and law there alluded to or asserted. Id. at 393-94.

In McClean-Behn Steel Erectors, Inc. v. OSHA, 608 F.2d 580, 582 (5th Cir. 1979), the Fifth Circuit reversed a post-hearing amendment, which raised new charges, finding that the administrative agency could have, but failed to, add charges before the evidenciary hearing closed:

> ...but the Secretary forwent that timely opportunity to afford petitioner adequate notice. Because the record in this case does not reveal uncontrovertibly that petitioner could not have prevailed in any defense to such a charge we find prejudice requiring reversal.

Accord: Drug Package Inc. v. NLRB, 570 F.2d. 1340, 1345 (8th Cir. 1978) and Soule Glass & Glazing Co. v. NLRB, 652 F.2d. 1055, 1074-75 (1st Cir. 1981).

As in McLean-Behn Steel Enterprises, can this Court say that Aacon could not have prevailed in defense of its other licenses (for which no specific evidence was ever adduced) had it an opportunity to do so?

The Court below asserted that the reason the Commission granted the four subsequent certificates was that it was improper to "delay" the processing of Aacon's petitions and applications based on a pending investigation proceeding. This reasoning fails to consider the law. First, the Commission's own regulations provide for exactly such a delay procedure. See, 49 C.F.R. 1067 et seq. (fitness flagging regulations).

The Commission's fitness flagging regulations arose from a series of cases involving North American Van Lines, Inc., in which the Court held that the Commission was required to hold fitness

flagging hearings, and in which the Court rejected Commission arguments that improper delay would result. In North American Van Lines, Inc. v. ICC, 386 F.Supp. 665, 677 (N.D.Ind. 1974), the Court noted:

> "...'fitness' in respect to new certificate applications is a case-by-case determination (so long as there is no consolidation of cases), and must ultimately be individually litigated in each application proceeding...[The] fitness investigation, even if there were a substantial factual link between it and the pending application proceeding, could only be evidence and not conclusive in the subsequent application proceedings. The illegality of past operations does not bar a carrier from seeking and obtaining additional certificates for operating authority."

(Citations omitted and emphasis supplied).

North American Van Lines, supra, was the genesis of the Commission's enactment of the fitness flagging regulations, 49 C.F.R. 1067 et seq. Accordingly, it cannot now be found that the right to revoke certificates issued unconditionally

to a carrier under 49 U.S. Code 10925 exists on the basis of post hoc fears of delay.

The Court of Appeals misconstrued the "flagging" procedures of the Commission. Congress, in enacting the Interstate Commerce Act, provided that all certificates shall "remain in full force and effect" until they are the subject of a proceeding with notice to the parties. The only way that the property right in a certificate can be taken from a certificate holder is by such a proceeding. While the Commission has the authority to condition certificates, or to "flag" the application (thereby delaying the issuance of a certificate), in the instant case, the certificates were neither conditioned nor were the applications flagged. The certificates

were issued, they were issued unconditionally and they were never made a part of these proceedings.

The Court of Appeals has also confused the question of "fitness" in these proceedings. What the Commission stated when issuing the other certificates was that Aacon was specifically found fit for purposes of the issuance of those certificates, and that fitness for any purpose other than the issuance of those certificates could be determined in the proceeding. In other words, the issuance of the certificates and the finding of fitness therein foreclosed Commission action against those certificates under 49 U.S. Code Section 10925(a) unless they were made part of a revocation proceeding under 49 U.S. Code Section 10925(c). Congress has legislated therein that all

certificates "remain in effect" unless they are the subject of a formal revocation proceeding. None of Aaacon's other certificates were.

The Court of Appeals' footnote construing the sub 8x certificates also misconstrues the law. The Commission argued to the Court of Appeals that flagging had occured because the Commission knew that flagging was the sole method for tying together certificates to be issued to a carrier with a pending fitness proceeding. Fitness Flagging Procedures Ex Parte No. 55 (Sub 23), 1977 CCH Federal Carrier Reporter 46,925. The Commission is required by its regulations, 49 C.F.R 1067.7, to show cause, in fitness flagging, of what nexus, if any, existed between the certificate under investigation and any proposed to be issued. No such proceeding was held

herein. As the Fifth Circuit has correctly noted in Eagle Motor Lines, Inc. v. ICC, 545 F.2d 1015 (5th Cir. 1970), where an expansion of a certificate to other certificates and sub numbers has been issued without ministerial error or by intentionally misleading acts of the carrier, the Commission cannot revoke any certificate or sub numbers thereof until after giving the certificate holder notice and an opportunity to be heard on that certificate. Carl Subler Trucking Inc., 103 MCC 307 (1966), aff'd Carl Subler Trucking, Inc. v. United States, 315 F.Supp. 971 (S.D. Ohio 1970)

The analysis of the court below is also at variance with its earlier decision in B.J. McAdams, Inc. v. ICC, 698 F.2d 498 (D.C. Cir. 1983), wherein the court ruled that Sub X certificates

like Aaacon's Sub 8x were separate from the original certificate. Moreover, the Commission in issuing the Sub 8x certificate indicated that it did not "cancel" any other certificate but rather superceded certain certificates. The Commission has made clear in Stuart Trucking Company, Inc.-Transfer, 27 MCC 793, 796 (1982) that the use of the word "supercedes" is different from "cancels" and it does not require the carrier to give up the underlying authority, which is to "remain active" and separate therefrom.

CONCLUSION

The issues presented here involve petitioner's constitutional rights in a quasi-criminal proceeding. They represent grave issues either of first impression or of conflict among the Circuits. Accordingly, a writ of

certiorari by the Supreme Court is respectfully requested.

Respectfully submitted,

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November 10, 1986

BEST AVA

APPENDIX A

OPINION OF THE COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

LABLE COPY

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1559

AACON AUTO TRANSPORT, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS
AUTO DRIVEAWAY CO., INTERVENOR

Petition for Review of an Order of the
Interstate Commerce Commission

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Argued March 19, 1986

Decided June 10, 1986

Scott T. Johnson and *Ralph J. Zola* for petitioner. *Eugene M. Malkin*, *Morton E. Kiel* and *Mathew R. Schutz* were on the brief for petitioner.

Robert J. Grady, Attorney, Interstate Commerce Commission, with whom *Robert S. Burk*, General Counsel, *Henri F. Rush*, Deputy General Counsel, Interstate Com-

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

merce Commission, *Robert B. Nicholson* and *Marion L. Jetton*, Attorneys, Department of Justice were on the brief for respondents.

Daniel B. Johnson was on the brief for intervenor.

Before: ROBINSON, *Chief Judge*, and WALD and GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WALD.

WALD, *Circuit Judge*: Aaacon Auto Transport, Inc. ("Aaacon") challenges the Interstate Commerce Commission's ("ICC" or "Commission") total revocation of its operating authority for willful violation of a cease and desist order. Because we reject all of Aaacon's procedural challenges, and because the revocation decision is supported by overwhelming evidence, the petition for review is denied.

I. BACKGROUND

In 1966, Aaacon obtained a certificate of public convenience and necessity permitting it to transport "[*u*]*sed passenger automobiles* in driveaway service in secondary movements, with or without baggage, personal effects, and sporting equipment" with the restriction that the company could not move such automobiles "(1) having a prior movement by rail or water, (2) moving on government bills of lading, or (3) moving to automobile dealers." Joint Appendix ("J.A.") at 1-2. In 1971, the ICC began an investigation to determine whether Aaacon was violating the Interstate Commerce Act or the terms of its certificate. Respondents' Supplemental Appendix ("S.A.") app. A. An initial decision entered in 1973 concluded that Aaacon had violated several provisions of the Act and operated beyond its authority. That decision contained a proposed order specifying ten practices from which Aaacon had to cease and provided that Aaacon's certificate and additional grants of authority called "subnumbers" thereunder could be suspended or revoked in

whole or in part for willful failure to comply with the order. S.A. app. B at 13-16. The Commission affirmed the initial decision in 1976 and entered a general cease and desist order; Aaacon petitioned the ICC for clarification as to whether the 1976 order incorporated the 1973 proposed order but the petition was dismissed. *Aaacon Auto Transport, Inc.*, 124 M.C.C. 493 (1976); S.A. app. C. Aaacon then appealed to the Second Circuit, challenging the evidentiary basis for and scope of the Commission order. That court affirmed the ICC in an unpublished order. S.A. app. F.

In February, 1978, the Commission reopened the investigation for further proceedings to determine whether Aaacon had willfully violated the 1976 cease and desist order. S.A. app. G. Administrative law judge ("ALJ") Benice held sixteen days of non-evidentiary proceedings and then, over the objections of the ICC's Bureau of Investigations and Enforcement, entered an initial decision accepting Aaacon's proposed settlement involving a ten day suspension and the issuance of a more detailed cease and desist order superseding the 1976 order. S.A. app. H. ALJ Benice feared that the Commission would not revoke Aaacon's operating authority and concluded that the broader and more detailed order would better protect the public and "move [Aaacon] closer to the ultimate revocation of its operating authority in the event that it persists in [its] practices." *Id.* at 1.

The Commission reversed the initial decision and rejected Aaacon's offer of settlement. S.A. app. I. The Commission rejected Aaacon's argument that the detailed provisions of the 1973 proposed cease and desist order had never become effective, concluding that the 1976 order "incorporates *by implication* all the various fine points of the [1973] cease and desist order." *Id.* at 4. The Commission also specified that the Office of Hearings should appoint another examiner to conduct the proceedings on remand because of "the course of events at the

16 days of the hearing already held and the hearing officer's apparent involvement in the settlement negotiations." *Id.* at 6.

Aaacon appealed the Commission's decision to this court, challenging both the "removal" of ALJ Benice and the Commission's holding that its 1976 order had incorporated the provisions of the 1973 proposed cease and desist order by implication. In an unpublished decision dated October 16, 1981, this court found that the Commission's remand of the case to a different ALJ was not a "final order" which could be appealed. S.A. app. K at 3-5. The court noted that Aaacon's claim that the ICC had improperly altered the 1976 order might be reviewable because it would subject Aaacon to new obligations, but concluded that Aaacon's "alteration" argument was barred by *res judicata*. *Id.* at 5-6. The opinion explained that "[e]ven without determining whether the 1976 order in fact incorporated the 1973 order, . . . we view petitioner's 'alteration' argument as a semantic attempt to escape the properly preclusive effect of the Second Circuit's decision." *Id.* at 6.

In the meantime, the remand proceedings at the Commission had stalled—the case was assigned to a new ALJ in February, 1980, but he retired and the case was not assigned to ALJ Sarbacher until January, 1981. A prehearing conference was held in February, sixty-three days of evidentiary hearings were held in four cities between August, 1981, and May, 198[illegible] briefs were filed in July and August, and an initial decision was entered in February, 1983. ALJ Sarbacher concluded that Aaacon had willfully violated every provision of the 1976 cease and desist order, citing the testimony of 50 public witnesses presented by the Office of Compliance and Consumer Assistance ("OCCA") before the ALJ invoked the cumulative evidence rule. The initial decision detailed the violations under each paragraph of the 1973 cease and

desist order (as incorporated into the 1976 order) and included a 132-page appendix summarizing the 45 cases presented by OCCA witnesses. S.A. app. L. The ALJ's decision initially provided only that Aaacon's 1966 certificate should be revoked but ALJ Sarbacher subsequently corrected it to provide that all of Aaacon's operating authority, including four subsequently issued sub-numbers, should be revoked. S.A. app. L at 45; S.A. app. M.

The Commission affirmed the initial decision, rejecting all of the arguments Aaacon presses on appeal—that the removal of ALJ Benice was improper, that Aaacon lacked notice that all of its operating authority was at stake, and that the investigations should have been dismissed after three years pursuant to a provision of the Motor Carrier Act of 1980. The ICC adopted most of the ALJ's findings and conclusions and revoked all of Aaacon's operating authority. S.A. app. N. Aaacon then applied to the Commission for a stay of the revocation pending judicial review, which was denied by Commissioner Taylor. S.A. app. O.

II. Analysis

Aaacon makes four arguments on appeal.[1] We can summarily dispose of the claim that the Commission's finding of a willful violation of the cease and desist order was not supported by substantial evidence. "Substantial" does not do justice to the extent of the evidence of Aaacon's violations of the 1976 order—"overwhelming" is perhaps a more appropriate adjective. Aaacon's remaining arguments, while somewhat more substantial, are ultimately unavailing.

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[1] Other arguments advanced by Aaacon but not discussed in this opinion have been considered and found to be without merit.

A. *Automatic Dismissal Under § 11701(c)*

Aaacon argues that the Commission erred by not dismissing the proceedings by, at the latest, three years after the effective date of the Motor Carrier Act of 1980.[2] That statute extended to motor carrier proceedings the requirement that a formal investigative proceeding brought under § 11701(a) be "dismissed automatically unless it is concluded by the Commission with administrative finality by the end of the 3d year after the date on which it was begun." 49 U.S.C. § 11701(c) (1982).

These proceedings were initiated in 1971 pursuant to §§ 204(c) and 212(a) of the Interstate Commerce Act, and reopened in 1978 for further proceedings pursuant to § 212(a). Section 212(a), now recodified in pertinent part at § 10925(c)(1), provides that the Commission may revoke a certificate only after a carrier willfully violates an order, issued pursuant to § 11701, requiring compliance with the statute or a condition of a certificate. Section 11701(a), formerly codified in § 204(c) of the Interstate Commerce Act, gives the ICC authority to conduct formal investigative proceedings and to take appropriate action to compel carriers to comply with the Act. Because revocation must, at some point, be preceded by a formal investigation under § 11701,[3] Aaacon's argu-

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[2] Aaacon moved for dismissal both three years after the proceedings began, as specified in § 11701(c), and three years after the effective date of the Motor Carrier Act. Aaacon notes that this court does not have to decide when the three year period began to run because the proceedings should have been dismissed either way.

[3] Commissioner Taylor, in denying Aaacon's request for a stay, concluded that § 10925, read in connection with § 11701, creates a two-step process for revocation in which the first stage is a formal investigative proceeding under § 11701(a) culminating in a cease and desist order and the second stage is a proceeding to establish willful violation of that order. Because the second stage is not a "formal investigative proceeding" pursuant to § 11701(a), the three year cut-off in

ment that the Commission should have dismissed these proceedings has surface plausibility.[4]

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§ 11701(c) does not apply. S.A. app. O at 4-5. Further, because the Commission can enforce a cease and desist order at any time, application of § 11701(c) to revocation proceedings would not seem to further the congressional purpose of guaranteeing an end to Commission proceedings after three years. H.R. Rep. No. 1069, 96th Cong., 2d Sess. 40, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2283, 2322.

This argument is problematic because it implies that proceedings to establish willful noncompliance are free from the procedural requirements of § 11701(a) and, more to the point here, that such proceedings may last indefinitely Yet in the Motor Carrier Act Congress was concerned about delays in Commission proceedings and generally specified their allowable length. Indeed, the three year period of § 11701(c) is an exception to the general rule, established in § 10322(b)(1)(A), that nonrail proceedings involving oral hearings must result in an initial decision within 270 days. Section 10322(a) specifies that proceedings under § 11701(c) are not subject to its timetable, but if the second stage of revocation proceedings does not fall within § 11701(c) it would seem that the much shorter timetable of § 10322 should apply. We need not resolve this question, however, because we conclude that § 11701(c) is not applicable to the case at hand.

[4] Aaacon argues, for example, that the language of § 11701(c) applies to *all* formal investigations under § 11701(a). While this "plain meaning" approach intuitively seems plausible, it fails to be convincing upon reflection. All statutes are written in such absolute terms—even when Congress specifically wishes to address whether a provision of a statute should apply retroactively, this intention is usually incorporated into a savings clause rather than expressed separately in every provision of the statute. All this allegedly plain meaning of § 11701(c) can indicate is that the provision applies to all investigations commenced after the effective date of the Act, not that the provision applies to all pending cases. *Cf.* Burlington Northern Inc. v. United States, 679 F.2d 915, 917 (D.C. Cir. 1982) (refusing to retroactively apply a provision of the Staggers Act of 1980 which facially applies to all challenges to transportation rates).

The Commission rejected this argument, however, noting that it "consistently has held that Congress did not intend the new statute of limitations to apply to pending investigation proceedings, but only to investigations initiated after the effective date of the Act." S.A. app. N at 5; *see In re Louis J. Amato*, 367 I.C.C. 821, 825 (1983) (refusing to apply § 11701(c) to a pending proceeding because retroactive application would be inconsistent with congressional intent and the interests of justice). We agree that § 11701(c) does not apply to this pending investigation.

Aaacon correctly observes that, in general, agencies must apply the law in effect at the time a decision is made, even when that law has changed during the course of a proceeding. In *Bradley* v. *School Board of Richmond*, 416 U.S. 696, 711 (1974), the Supreme Court held that the law in effect at the time a decision is made applies "unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." The Court laid out several factors to consider in assessing whether "manifest injustice" would result, *id.* at 716-17, and stressed that its holding did not mean that decisionmakers "must always . . . apply new laws to pending cases in the absence of clear legislative direction to the contrary," *id.* at 715.

This case presents an exception to the general rule that statutory changes should apply to pending cases because Congress has indicated that it would not want across-the-board retroactive application of the Motor Carrier Act of 1980.[5] While Congress did not explicitly

[5] Thus, this case is distinguishable from Aero Mayflower Transit Co. v. ICC, 686 F.2d 1, 7 n.10 (D.C. Cir. 1982), in which this court held that a provision of the Motor Carrier Act of 1980 prohibiting the ICC from issuing certificates based on general findings developed in rulemaking proceedings applied to pending applications. The court specifically found that "Congress intended to prohibit 'the issuance of a certificate'

address the question of what law should apply in pending proceedings, we need only a "fair indication" of congressional intent. *Litton Systems, Inc.* v. *AT&T*, 746 F.2d 168, 174 (2d Cir. 1984). Here we have findings accompanying the Act which specify that "legislative and resulting changes should be implemented with the least amount of disruption to the transportation system consistent with the scope of the reforms enacted." Motor Carrier Act of 1980, Pub. L. No. 96-296, § 3(a), 94 Stat. 793, 793 (1980). The Fifth Circuit relied on this congressional finding to support its conclusion that Congress did not intend the Motor Carrier Act to apply retroactively to pending proceedings. *Watkins Motor Lines, Inc.* v. *ICC*, 641 F.2d 1183, 1186-87 (5th Cir. 1981);[6] *see also Curtis, Inc.* v. *ICC*, 669 F.2d 648, 651 n.3 (10th Cir. 1982) (following *Watkins*). The *Watkins* court found that it would be disruptive to require the parties "to be thrust back to the beginning" of the proceedings and noted that applying the prior law did not violate the intent or spirit of the 1980 statute. 641 F.2d at 1187-88.

We conclude that retroactive application of § 11701(c) to this proceeding would similarly be disruptive without furthering the purposes of the Act. A dismissal order would not affect the ICC's authority to enforce the 1976 cease and desist order. Given the evidence against Aacon adduced in this proceeding, it seems a foregone conclusion that if this investigation were dismissed at this late date the Commission would start up another investigation

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based on a general finding developed in a rulemaking proceeding if the certificate was issued after the July 1, 1980 effective date of the Motor Carrier Act." *Id.* at 7.

[6] The *Watkins* holding applied to proceedings in which the ICC had rendered a decision as of July 1, 1980, the effective date of the Act. 641 F.2d at 1187. We extend *Watkins'* reasoning to these proceedings, which were "well underway" as of that date. *See infra* at 11.

and spend up to another three years replicating its efforts. Rather than implementing the congressional intent of giving Aaacon a "guarantee of an end to formal Commission investigations" within a three year period, H.R. Rep. No. 1069, 96th Cong., 2d Sess. 40, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2283, 2322, such a scenario would ironically, subject Aaacon to additional years of investigation.

This court has also relied upon factors such as promotion of administrative and judicial economy in assessing whether considerations of "manifest injustice" preclude applying a new statute to a pending proceeding. In *Burlington Northern Inc.* v. *United States*, 679 F.2d 915 (D.C. Cir. 1982), we declined to apply the Staggers Rail Act of 1980 to a pending proceeding on these grounds. Much of the court's reasoning there is applicable to this case:

> [T]he legal and factual issues had already been extensively litigated before the Commission, and the issues involved related to events and rates that antedated the Staggers Act by several years. Under the circumstances, it would work a substantial and manifest injustice on [the company challenging a rate increase] to force it to relitigate these issues before a court, and it would be a poor use of judicial resources as well as those of the parties to duplicate the Commission's competent efforts on these issues.

Id. at 917. Although our concern in that case focussed on burdening a private litigant, an equally apposite consideration arises here if OCCA, which represents the interests of consumers before the Commission, is required to expend its limited resources in relitigating the charges against Aaacon.

The import of both the congressional directive to avoid disruption and the manifest injustice of wasting private, administrative, and judicial resources varies depending on how long the pending proceedings have been ongoing.

This court's refusal to retroactively apply the provisions of the 1980 Staggers Act involved ICC proceedings which were well underway on the effective date of the Act. *Burlington Northern*, 679 F.2d at 917; *Burlington Northern Railroad* v. *ICC*, 679 F.2d 934, 939 (D.C. Cir. 1982). The instant proceedings were "well underway" when the Motor Carrier Act was enacted on July 1, 1980. The reopened proceedings began in 1978 and by July of 1980, when the statute went into effect, had already produced an initial decision and a Commission reversal and remand. We therefore hold that § 11701(c) did not apply to the pending investigation of Aaacon.

B. *Change of Administrative Law Judges*

Aaacon contends that the Commission erred by "replacing" ALJ Benice with ALJ Sarbacher without complying with the Administrative Procedure Act ("APA"), which requires an agency to assess the bias of an ALJ "[o]n the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification." 5 U.S.C. § 556(b) (1982). Aaacon argues that § 556(b) provides the only procedure for removal of an ALJ without violating the APA's requirement that ALJs "shall be assigned to cases in rotation so far as practicable." 5 U.S.C. § 3105 (1982). This argument is based on a misunderstanding of both provisions.

While § 556(b) clearly specifies one way in which ALJs can be removed from a proceeding, it is not the exclusive avenue. That section is clearly inapposite to this incident, which involves no charge of bias or other disqualification against ALJ Benice by a party. The question to be addressed here is whether the ICC properly ordered the proceedings on remand to be assigned to another ALJ for reasons other than bias.

The Commission cited, as one reason for its decision, ALJ Benice's inadequate handling of the sixteen days

of proceedings held prior to issuance of his initial decision.[7] S.A. app. I at 6. The ICC is authorized to delegate matters to ALJs and to change or rescind such delegations at any time. 49 U.S.C. § 10305(a) (1982). This authority is, of course, cabined by the APA, which requires agencies to assign ALJs in rotation to the extent "practicable." 5 U.S.C. § 3105. The Supreme Court has held, however, that the word "practicable" is broad enough to encompass factors such as the complexity of the case and the experience and ability of the ALJ. *Ramspeck* v. *Federal Trial Examiners Conference*, 345 U.S. 128, 139-40 (1953). The ICC's decision to change ALJs on remand because of ALJ Benice's proven inability to cut through Aaacon's dilatory tactics and move the proceedings along plainly falls within the "modicum of discretion" which *Ramspeck* accords the ICC in its assignment of ALJs. *See Tractor Training Service* v. *FTC*, 227 F.2d 420, 423 (9th Cir. 1955), *cert. denied*, 350 U.S. 1005 (1956).

Thus, although Aaacon's arguments indicate that the Commission did not have to reassign the case on remand, they do not establish that the ICC abused its discretion under *Ramspeck* in choosing to do so. The Commission cannot, of course, change ALJs if the intent or effect of its action is to interfere with the independence of the ALJ or otherwise to deprive a party of a fair hearing. *Tractor Training*, 227 F.2d at 423-24; *Chicago, Burlington & Quincy Railroad*, 318 I.C.C. 180, 183 (1962). Aaacon has not, however, established that this was the ICC's intention or that the switch was in any way

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[7] The other reason the ICC gave for the change of ALJs on remand was ALJ Benice's participation in the settlement proceedings. S.A. app. I at 6. Because we conclude that the ICC could make the reassignment to rectify ALJ Benice's indecisive handling of the initial proceedings, we need not rule on the appropriateness of this second rationale.

prejudicial to Aaacon. ALJ Benice did not preside at the taking of any evidence, so the change did not require the new ALJ to make credibility determinations as to witnesses he had not heard. And Aaacon's argument that rulings by the new ALJ demonstrate prejudice is patently erroneous: these rulings do not evidence an abuse of discretion, although they may differ from those the original ALJ would have made. Indeed, Aaacon can never even know for sure how the first ALJ would have ruled on those issues. We therefore conclude that there is no evidence that the change of ALJs in the remanded proceedings failed to conform with the requirements of the APA or otherwise deprived Aaacon of a fair hearing.

C. *Revocation of Aaacon's Operating Authority*

Finally, Aaacon charges that the Commission erred by allowing the ALJ to change his order to provide that all of Aaacon's authority, rather than just its 1966 Sub-No. 1 certificate, should be revoked. The Commission rejected this argument, concluding that Aaacon had adequate notice that all of its operating authority was at issue in the revocation proceeding. We agree.

The Commission order instituting the revocation proceeding noted only that Aaacon's 1966 certificate could be revoked. S.A. app. G. At that time, however, that certificate constituted all of Aaacon's operating authority. Even if the notice was flawed due to its failure to note that sub-number certificates issued under the 1966 certificate in the future would be subject to revocation, any inadequacy was remedied by the notice afforded to Aaacon during the conduct of the proceedings. *See Common Carrier Conference—Irregular Route* v. *United States*, 534 F.2d 981, 983 (D.C. Cir.) (flawed notice overcome if actual conduct of the rulemaking provides notice), *cert. denied*, 429 U.S. 921 (1976); *National Steel*

& Shipbuilding Co. v. *Director, Office of Workers' Compensation Programs*, 616 F.2d 420, 421 (9th Cir. 1980) (same is true in adjudicatory proceedings).

The 1973 proposed cease and desist order, incorporated into the 1976 order, provided Aaacon with notice that all of its sub-number certificates were at stake in the revocation proceedings. The eleventh paragraph of the order provided that "upon the willful failure of respondent to comply with any of the provisions of this order, the certificate issued to the respondent, AAAcon Auto Transport, Inc., in No. MC-125808 *and sub-numbers thereunder*, may be suspended or revoked in whole or in part." S.A. app. B at 15 (emphasis added). Aaacon claims that this portion of the proposed order was not, for some reason, incorporated by implication into the 1976 order. Reply Br. at 16. This court has already held, however, that Aaacon is barred by *res judicata* from relitigating the scope of the 1976 order and whether it incorporated the 1973 proposed order, because those issues were or could have been brought before the Second Circuit. S.A. app. K at 5-6; *see supra* at 3-4. That decision constitutes the law of this case and so we proceed on the assumption that all of the 1973 proposed order, including paragraph 11, was incorporated into the 1976 order and is binding on Aaacon.

Aaacon also contends that its sub-number certificates could not be revoked because the ICC failed to "flag" the issue of Aaacon's fitness when it granted the company additional operating authority during the time the revocation proceedings were going on. This argument is, however, based on a misunderstanding of the Commission's "flagging" regulations. The flagging regulations require a hearing when the Commission decides *not* to issue any new authority to a carrier pending adjudication of that carrier's fitness in an ongoing application proceeding. The purpose of such a hearing is to determine whether the fitness issue in the selected application

proceeding has a sufficient nexus to the other requested authority to warrant withholding the requested new authority until the fitness issue is resolved. 49 C.F.R. §§ 1067.1, 1067.7 (1985).

Here, however, the Commission granted the requested new authority rather than withholding it pending the outcome of the revocation proceedings, so no "nexus" hearing was required under the flagging regulations. During the course of the revocation proceedings Aaacon received four additional sub-number certificates. In Sub-No. 7 Aaacon sought authority to transport used automobiles in wrecker service.[8] S.A. App. N at 13. Aaacon also requested two modifications of its certificate: M1F to remove the restriction precluding movements to automobile dealers and M2F to delete the word "used" and allow movement of all passenger automobiles. J.A. at 10-15, 20-25. Finally, Aaacon sought a restriction removal in Sub-No. 8x allowing it to move all transportation equipment, rather than just automobiles. *Id.* at 3-9. All of these sub-numbers were granted rather than withheld, so the flagging regulations never came into play.

Neither did the Commission's actions in the sub-number proceedings in any way indicate that those additional authorities would survive the revocation proceeding.[9] In

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[8] In that proceeding Aaacon and the Bureau of Investigations and Enforcement (predecessor of OCCA) stipulated that the Bureau would reserve for the revocation proceeding all evidence on Aaacon's fitness. S.A. app. N at 13.

[9] Aaacon's argument that the revocation proceeding encompassed only the 1966 certificate assumes that the sub-number certificates pertained to operations independent of those authorized in the original certificate. In fact, however, all of the sub-number certificates grow out of and depend upon the original certificate and all the grants assumed that the underlying certificate was valid.

Aaacon's Sub-No. 8X certificate, for example, resulted from a restriction removal proceeding and provided that it "super-

each proceeding, the Commission was careful to establish that the fitness issue was simply being reserved for the revocation proceeding. *See* Commission Decision, S.A. app. N at 13. Thus, rather than restricting the scope of the revocation proceeding as Aaacon claims, these sub-number proceedings actually provided Aaacon with additional notice that the revocation proceeding encompassed the issue of fitness to hold all of the sub-number certificates.

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seded" the original certificate. J.A. at 6. The Commission has explained that an "X" certificate, which supersedes rather than cancels the underlying authority, is so intimately linked to the original certificate that the two must be treated as a single operating right. Stewart Trucking Co., 127 M.C.C. 793, 796-97 (1982). In addition, restriction removal proceedings are supposed to proceed swiftly, so this court has held that the issue of an applicant's fitness to hold the underlying certificate may be considered in a separate proceeding rather than in the restriction removal proceeding. B.J. McAdams, Inc. v. ICC, 698 F.2d 498, 503 (D.C. Cir. 1983). That is exactly what the Commission did here. J.A. at 8.

The M1F and M2F certificates simply modified the original certificate. The M2F proceeding was decided first and deleted the word "used" from the certificate; it certainly makes no sense to consider such authority separately from the 1966 certificate. The M1F proceeding modified the original certificate to delete the restriction against deliveries to automobile dealers. The M1F certificate cancelled the original certificate and replaced it with one encompassing the original authority and the changes made in both the M1F and M2F proceedings. J.A. at 19. Again, however, the proceeding assumed that Aaacon was fit to hold the original authority as incorporated into the M1F sub-number certificate.

If Aaacon is to be believed, the company, OCCA and the ICC spent years litigating the question of whether to revoke a superseded and cancelled certificate. After examining the proceedings on the sub-number certificates, however, we conclude that all involved understood that all of Aaacon's operating authority was tied to the 1966 certificate and assumed that if that certificate was revoked the subsequently-issued sub-numbers would also be revoked.

III. Conclusion

Aaacon's protracted journey through the Commission and the courts has finally come to a dead end. We find no procedural error in the Commission's decision to revoke all of Aaacon's operating authority for willfully failing to comply with the 1976 cease and desist order. The decision is supported by more than substantial evidence in the record. Aaacon's petition for review is accordingly

Denied.

APPENDIX B

DENIAL OF AAACON'S SUGGESTION FOR REHEARING B1

DENIAL OF AAACON'S SUGGESTION FOR REHEARING EN BANC B2

DECISION OF INTERSTATE COMMERCE COMMISSION (1984) B3-122

DECISION OF INTERSTATE COMMERCE COMMISSION (1980) B123-145

ORDER OF INTERSTATE COMMERCE COMMISSION (1976) B146-149

United States Court of Appeals
For the District of Columbia Circuit

No. 84-1559 **September Term, 1985**

Aacon Auto Transport, Inc.

v.

Interstate Commerce Commission
and United States of America

BEFORE: Wald, Chief Judge; ROBINSON and GINSBURG, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY:
Robert A. Bonner
Chief Deputy Clerk

B-1

United States Court of Appeals
For the District of Columbia Circuit

No. 84-1559 **September Term, 1985**

Aacon Auto Transport, Inc.

v.

Interstate Commerce Commission
and United States of America

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ginsburg, Bork, Scalia, Starr, Silberman, Buckley & Williams, Circuit Judges

ORDER

Petitioner's suggestion for rehearing en banc has been circulated to the full Court. No member of the Court has requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that petitioner's suggeston for rehearing en banc is denied.

Per Curiam

BY THE COURT:
GEORGE A. FISHER, CLERK

BY: Robert A. Bonner
Chief Deputy Clerk

INTERSTATE COMMERCE COMMISSION

No. MC-C-7287

AAACON AUTO TRANSPORT, INC.,
INVESTIGATION AND REVOCATION OF CERTIFICATE

Decided: July 30, 1984

On appeal by respondent, the finding of the Administrative Law Judge, as modified and supplemented in this decision, are affirmed. Respondent is found to have willfully violated the provisions of the Commission's cease and desist order of April 7, 1976. Respondent's operating authority in No. MC-125808 and subnumbers thereunder is revoked.

Kenneth B. Goldstein, Scott T. Johnson, Eugene M. Malkin, and Ralph J. Zola for respondent.

Michael J. Falk and Stuart B. Robbins for the Office of Compliance and Consumer Assistance, Interstate Commerce Commission.

Daniel B. Johnson and Gary E. Thompson for intervenor.

No. MC-C-7287

DECISION

PROCEDURAL HISTORY

This investigation and revocation proceeding was first instituted by an order entered March 18, 1971, to determine, among other things, whether respondent was engaging in unjust and unreasonable practices in connection with matters relating the the transporation of automobiles, in driveaway service. In an initial decision entered November 15, 1973, Administrative Law Judge Joseph A. Reilly found that respondent had been in violation of certain provisions of the Interstate Commerce Act, and he therefore issued a cease and desist order. In a report and order entered April 7, 1976, in AAACon Auto Transport-Invest. & Revoc. of Certif., 124 M.C.C. 493 (1976), Division 1 on exceptions

essentially affirmed the Administrative Law Judge's findings. The order of Division 1 directed respondent to cease and desist, and thereafter refrain and abstain, from all of those practices found in the report to be unjust, unreasonable, and unlawful. (See the Appendix for the pertinent paragraphs of the Commission's cease and desist order.1/) Respondent thereafter petitioned for reopening and reconsideration, but its petition was denied by Division 1, Acting as an Appellate Division, and the effective compliance date of Division 1's order was set as August 3, 1976. On July 28, 1976, respondents president, Ralph Zola, on

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1/ The Division's order itself does not appear in the bound volume; only the report and the Administrative Law Judge's recommended order were reproduced. (See 124 M.C.C. 493, 510-511 **(cont'd)**

behalf of respondent, file the requisite certificate of compliance.

By an order entered February 9, 1978, Division 1 reopened this proceeding to determine whether respondent had willfully failed to comply with the commission's cease and disist order. In its decision, Division 1 indicated that respondent's Certificate No. MC-125808 (Sub-No. 1) (the only authority then held by respondent) might be suspended or revoked in whole or in part, upon a finding of willful failure to comply. The reopened proceeding was assigned for oral hearing before Administrative Law Judge J. Lee Benice. Following discovery, pre-hearing conferences,

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(cont'd) for the latter.) As indicated in the Appendix, the substance of the administrative Law Judge's order was incorporated by implication in the order of Division 1.

extensive hearings, and "in-chambers" negotiations, the Administrative Law Judge entered an initial decision on November 13, 1979. In his decision, he accepted respondent's Offer of Settlement, over the objections of the Bureau of Investigations and Enforcement (the predecessor to the Office of Compliance and Consumer Assistance). The substance of the initial decision and the Offer of Settlement was that respondent would be made subject to a 10-day suspension of its operating authority and to a new cease and desist order. On exceptions by the Bureau and Intervenor Auto Driveaway Company, Division 1 rejected respondent's Offer of Settlement and vacated the initial decision. Finding that the hearing had produced no real evidence, the Division remanded the proceeding for further oral hearing.

However, in view of the course of events at the hearing already held and the hearing officer's apparent involvement in the settlement negotiations, the Division remanded the proceeding for hearing before a different Administrative Law Judge, to be designated by the Office of Hearings. Respondent challenged the above decision before the United States Court of Appeals for the District of Columbia Circuit. The Court, however, dismissed respondent's petition for review, finding that the Commission's remand of the proceeding to a different Administrative Law Judge was not a "final order" of the Commission and that, therefore, the Court had no jurisdiction to hear petitioner's challenge. AAACon Auto Transport, Inc. v. ICC, No. 80-1601 (D.C. Cir. Oct. 16, 1981).

Subsequently, 2 days of pre-

hearing conferences and 63 days of hearings were held before Administrative Law Judge Harold J. Sarba (ALJ) at New York, NY, Los Angeles, CA, Fort Lauderdale, FL, and Washington, D.C. At the hearings, the Commission's Office of Compliance and Consumer Assistance (OCCA) sponsored 58 witnesses, and AAACon sponsored the testimony of approximately 80 witnesses, most of whom appeared and testified orally. Among respondent's personnel to appear and testify were Mr. Harvey Blackman, AAACon's national operational manager and Mr. Charles Silverstri, its claims manager. Mr. Ralph Zola, AAACon's chief counsel, president, and principal shareholder, did not appear as a witness for respondent in view of certain provisions of the American Bar Association's code of Professional Responsibility Disciplinary

Rules. In his decision entered February 22, 1983, served February 28, 1983, Administrative Law Judge Sarbacner found that respondent had repeatedly violated the provisions of the Commission's cease and desist order of April 7, 1976, that the violations were willful, and that, as a result of such violations, repondent;s Sub-No. 1 certificate should be revoked. Subsequently, by notice entered March 17, 1983, served March 22, 1983, the ALJ modified his initial decision by extending his sanction of revocation to all of the authority respondent has acquired since the institution of this proceeding, specifically, the authority in Sub-No. 1 (M1F), Sub-No. 1 (M2F), Sub-No. 7, and Sub-No. 8X. The ALJ ordered that a copy of his decision be served on the 141 Councils of the Better Business Bureau, Inc., which he listed in Appendix

L to his decision. Respondent has filed an appeal to the initial decision, and OCCA and Intervenor Auto Driveaway Company have replied.

PRELIMINARY MATTERS

Embraced in respondent's appeal is a pro forma request for oral argument. The request will be denied. This proceeding has been the subject of numerous delays, and no good reason appears for further protracting it. The record as it now stands is sufficiently detailed to have guaranteed respondents a fair hearing on the issues and to enable us to render an informed decision.

Subsequent to its appeal, AAACon filed a motion to waive the timely filing of four petitions (pleadings), accompanied by a motion to strike material in the replies to its appeal, a

motion to have the Commission take administrative notice of its own public complaint files, and an Offer of Settlement. The fourth pleading, a motion to adduce additional evidence, embracing tendered additional evidence, was filed 3 days later. The four tendered pleadings will be discussed in order, but first, we will dismiss as moot the motion to waive the requirement for timely filing. The motion to strike material in the replies was filed within 20 days of the filing of those replies and thus is timely. 49 CFR 1104.13. The Commission's Rules of Practice do not specify times within which the remaining three pleadings must be filed, and there thus is no time period to be waived. The rule cited by respondent at 49 CFR 1115.3 is not relevant.

AAACon's motion to strike is, as

OCCA and Intervenor contend, largely an impermissible reply to a reply. 49 CFR 1104.13(c). Although the pleading contains seven identifiable requests to strike specified matter, some assailed matter is not clearly the subject of any motion to strike. Some of the identifiable motions clearly are directed to mere argument and, in fact, themselves consist of argument. In brief, in considering this motion, it is difficult to discern where argument ends and bona fide motion to strike begins. Therefore, we will deny the motion or motions. However, we will consider the matter contained in the pleading, waiving, to the extent necessary, the proscription against a reply to a reply.

We note that the pleading contains two requests for official notice. First, relative to the inclusion of

AAACon's Sub-No. BX Certificate in the sanction imposed, AAACon requests that the Commission take official notice of the dates and contents of the orders and decisions in the various proceedings leading up to the issuance of the certificate. This request will be denied. The issue of the extension of the revocation sanction to all of respondent's authority will be considered in detail below. All relevant orders and decisions will be considered to the extent necessary for resolution of the issue. Second, AAACon requests that we take official notice of the Congressional enactment of 49 U.S.C. 10321(d). AAACon argues that the cited section authorizes a party to a proceeding before the Commission to take depositions, that the section sets no limitation, and that the ALJ's refusal to allow requested

discovery violates the statute. Respondent's argument is specious. Subsection (a) of the cited section provides that, "the Commission may prescribe regulations in carrying out this subtitle." The Commission's regulations at 49 CFR 1114.21(b)(2), regarding depositions, advises that such discovery procedures may be used only when the Commission, upon its own motion or upon verified petition of a party, has entered a decision approving discovery. Clearly, there is no validity to respondent's argument that there is no limitation on the right to take depositions.

In its next pleading, AAACon requests that the Commission take official notice of its public complaint files. Specifically, it is requested that the Commission examine the

complaint statistics on file concerning jurisdictional complaints filed by shippers for 1982. AAACon argues that the claims handling activities of other carriers, such as intervenor Auto Driveaway and a carrier identified as Autolog, create a base rate from which AAACon's actions can be measured. Embraced in the pleading are samplings (quoted language) from shippers' written complaints filed with the Commission during 1982. AAACon asserts that it is submitting this evidence by motion for the reasons that, (1) it was precluded by the ALJ from presenting evidence of competitors' base rate complaint error levels, (2) AAACon believes that the Commission should have a fully developed record, (3) the evidence will not be cumulative since it was excluded by the ALJ, and (4) the evidence consists of

material all of which is within the possession of the Commission.

This motion also will be denied, and the embraced tendered supplemental evidence will be rejected. As the ALJ correctly noted, other carriers' activities are not in issue. Moreover, as will be fully discussed below in our consideration of AAACon's appeal, we do not find validity in respondent's arguments regarding base rates, percentages of violations, and comparisons with other carriers. Two additional comments are warranted here. First, AAACon seeks to limit our focus to "claims errors." A substantial percentage of the violations found to have been committed involve neither claims nor errors. Second, AAACon seeks to limit our focus here to the year 1982. Statistics for the recent past obviously

can be influenced by recent remedial efforts. Our attention will not be diverted from any violations which occurred commencing in August 1976. These matters will be more fully discussed below in connection with a consideration of AAACon's appeal.

Contending that this proceeding would best be concluded by a settlement that assures the Commission of (1) reformation of respondent's activities, (2) preservation and encouragement of competition, and (3) control of the activities of respondent's principals, AAACon has submitted a revised Offer of Settlement. The Offer of Settlement contains 24 sections the provisions of which assertedly would accomplish "exactly what the original proceedings sought to achieve." The intent of the Offer, it is argued, is to conclusively

resolve all of the outstanding issues which have been raised. The Offer of Settlement will be rejected.

First, in an introductory paragraph, respondent acknowledges responsiblity for "errors in its claims and tariff processing." Demonstrated violations in a number of other areas, including those addressed in paragraphs 6, 7, 8, and 10 of the cease and desist order are not acknowledged. More important, the Offer scarcely addresses several of these areas, particularly those which are the concern of paragraphs 7 and 8, the provisions of which the ALJ properly termed "crucial." (Initial decision, p. 22.) Further, by some of the sections of its proposed Offer of Settlement, respondent simply offers to do that which it already was required to do, if not less. For instance, AAACon,

in section 5, offers to "require all claims employees to use their actual names in handling claims." (Emphasis added.) Paragraph 9 of the cease and desist order proscribes the misrepresenting of the identity of any officer, employee, or agent with whom the the shipper deals on matters relating to claims. (Emphasis added.) Moreover, by other sections of its Offer, respondent simply proposes to do many things which it already assertedly has done, things which sound business judgement would require, or things which common sense would dictate. The Offer of Settlement is woefully inadequate at this stage of this proceeding.

AAACon's tendered additional evidence consists of 19 pages of argument and explanation and 50 exhibits. 2/

2/ See next page

AAACon moves to adduce this tendered evidence which consists of material relevant to matters occurring since the close of the record, as well as material concerning matters which assertedly were raised for the first time in the initial decision. In the latter area, AAACon seeks to introduce 22 exhibits which assertedly support respondent's exhibit 528, the statement of Mr. Charles Silvestri. AAACon contends that the additional evidence is succinct, relevant, non-cumulative, and could not have been presented during the hearings either because it did not occur until after the close of the record or because

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2/ The 50 exhibits are numbered 1 to 52. Exhibits 24 and 41 are missing. The former assertedly is a decision of the New York State Department of Labor rejecting a claim by former AAACon employee Robin Diaz (an OCCA witness) that her employment had been improperly terminated. The pleading contains no reference to exhibit 41.

AAACon was not aware tht the material it had presented through Mr. Silvestri "would not be considered."

The motion will be denied, and the tendered evidence will be rejected. First, we note that the more than 200 pages of material submitted is not what we would consider succinct, and, also, we query why the matter in support of Mr. Silvestri's statement, assertedly available in the hearing room, was not submitted unitl 48 days after respondent filed its appeal.

Turning to a brief examination of the material submitted, we find as follows. Twenty-two exhibits purportedly corroborate Mr. Silvestri's statement beyond refutation. First, if, as is asserted, the matter was available in the hearing room, we must query why AAACON did not attempt to introduce it at the hearing. Second, as will be more fully

discussed below in connection with respondent's appeal, contrary to respondent's assertions Mr. Silvestri's evidence was neither ignored nor excluded. Next, we note that the tendered evidence concerns the facts surrounding a number of specific claims. It is AAACon's general operating practices, no the precise facts of any particular claim, which are the subject of our investigation. Finally, and of much significance, in examining the tendered evidence in order to determine whether to accept it, we have spot-checked a number of the exhibits, and we find that some are not even clearly supportive of the propositions or positions for which they are presented.

AAACon has submitted evidence in eight other areas not related to Mr. Silvestri's statement. We find the

matter in each area to be of little or no relevance or of no material bearing on the disposition of this proceeding. In sum, acceptance of the tendered additional evidence would unnecessarily burden the record and protract this proceeding for no useful purpose. The record is sufficiently well developed to enable us to render an informed decision.

Petitions for leave to intervene on behalf of respondent have been filed by Isidore Gittler, a customer of AAACon, Stephen J. Walter, an AAACon agent, and Jack Pieper, on behalf of Royal Business Machines, also a customer of AAACon. These petitions also will be denied. The Gittler and Pieper petitions are simply unverifed testimonials, and Mr. Pieper does not show that he has authority to speak on behalf of Royal Business Machines. The Walter statement, while

verified, siimply repeats arguments already made by AAACon. We see no good reason to enlarge the record with these three pleadings, and they will be rejected.

Respondent has filed a motion to dismiss the proceeding. In support of its motion, it cites the new statute of limitations established by Section 26 of the Motor Carrier Act of 1980, codified at 49 U.S.C. 11701(c). The cited section provides that, "a formal investigative proceeding begun by the Commission...is dismissed automatically unless it is concluded by the Commission with administrative finality by the end of the 3d year after the date on which it was begun." Inasmuch as the statute was enacted on July 1, 1980, respondent asserts that the instant proceeding must be dismissed for the reason that it was

not administratively final as of July 1, 1983. Respondent argues that the legislative history and language of the Motor Carrier Act, as well as a number of cited court decisions, support its position. The motion will be denied.

The Commission consistently has held that Congress did not intend the new statute of limitations to apply to pending investigation proceedings, but only to investigations initiated after the effective date of the Act. See, In the Matter of Louis J. Amato, 367 I.C.C. 281, (1983), and Ex Parte No. 369, In the Matter of John M. Nader (not printed), served April 5, 1984, and cases cited therein. We note, further, that there is nothing in the legislative history of Section 26 that would suggest that Congress intended a respondent to benefit when its conduct has contributed

materially to the length of time taken to conclude a proceeding. Here, respondent has greatly contributed to a number delays, the latest resulting from the filing of its five most recent pleadings, which spawned the filing of a number of other pleadings.

In response to OCCA's reply to its motion to dismiss, AAACon has filed a motion to waive the rule against a reply to a reply, embracing its reply. The tendered pleading is directed to mere argument, and no good reason appears for accepting it. The motion will be denied and the tendered reply rejected.

Finally, OCCA has filed a motion to strike (reject) the above-described pleading. The OCCA pleading was tendered for filing 1 day late and is moot in view of our action described above. Accordingly, the motion will be rejected.

THE INITIAL DECISION

In view of the gravity of the alleged violations and the magnitude of the recommended sanction, we will highlight the salient findings and observations of the ALJ before turning to a consideration of the issues raised on appeal.

A major component of the initial decision is an extensive appendix in which the ALJ presented a synopsis of the evidence relative to 45 driveaway movements which involved claims for loss or damage. Experiences of shippers or claimants were detailed, references to testimony of witnesses for both OCCA and respondent were made, and excerpts of testimony were included. The evidence synopsized in the appendix formed the basis of the ALJ's findings, and references to the appendix were made

throughout the initial decision. At the end of the appendix, the ALJ indicated that, at the completion of the third session of oral hearings, he invoked the cumulative evidence rule, required OCCA to rest its case, and in effect, canceled the 3 additional weeks of hearings originally scheduled for OCCA. The ALJ opined that,

> Otherwise, given the opportunity, the OCCA could have, and would have, inundated the record with countless horror stories experienced by AAACon's customer-claimants whose legitimately-filed claims were delayed, discouraged, decreased, or denied by respondent for numerous reasons, many of which border near or within the realm of fantasy. (I.D., Appen. G, p. 131.)

In his decision, the ALJ found that the evidence apmly supports the conclusion that respondent knowingly and willfully violated the Commission's 1976 cease and desist order on numerous

occasions.3/ The ALJ set forth the 10 paragraphs of the cease and desist order containing proscriptions, and by reference to his synopsis of the evidence, he provided representative examples of violations of each paragraph. (As indicated above, the referenced paragraphs of the cease and desist order are set forth in the Appendix in this decision.) In discussing the violations of each paragraph, the ALJ emphasized that his examples were representative.

3/ At a number of points in his initial decision, the ALJ discusses whether violations were both knowingly and willfully committed. The statute provides that the Commission may revoke any part of a certificate for willful failure to comply with a regulation or order of the Commission. 49 U.S.C. 10925 (b). The decision entered March 18, 1971, instituting this proceeding, the cease and desist order entered April 7, 1976, and the order entered February 9, 1978, reopening this proceeding all speak only of willful failure to comply. Accordingly, we will limit discussion to the issue of respondent's willfulness.

In addition, in discussing many of the claimants' experiences, the ALJ made cross-references, indicating violations of two or more paragraphs. Indeed, with regard to the treatment of at least one claimant, it was found that violations of each of paragraphs one through nine were committed.

Paragraph 1 concerns the utilization of bills of lading which incorporate unreasonable provisions. The ALJ found violations of this paragraph, primarily in the use of an "Arbitration of Claims" clause that provides for compulsory arbritration and limits the arbitrator's jurisdiction to the enforcement of "federal law of interstate transportation." Paragraph 2 concerns policies that negate the common carrier responsibility for property in respondent's possession. The ALJ found

that, "with respect to most, if not all, of the 45 movements [described in his appendix], AAACON has violated" the proscription of this paragraph. (I.D. p. 6.) In his representative examples, the ALJ decried what he viewed as "stall tactics." (I.D., p.7.) Similarly, with respect to paragraph 3, requiring the prompt and thorough investigation and processing of claims, the ALJ found that, "with but isolated exceptions," respondent has violated this paragraph. (I.D. p. 9.) A number of unjustifiable delays in processing claims were cited. One of the worst violations, it is noted, involved a claim filed on December 3, 1975, and not settled until nearly 6 years later, 2 weeks prior to the claimant's presenting testimony on behalf of OCCA.

Paragraph 4 concerns arbitrarily

denying claims when the facts available to respondent are inconsistent with denial. In examining the evidence with a view toward violations of this paragraph, the ALJ determined that,

> There are numerous instances described in the record...where AAACon's drivers have been negligent; and as a result of such negligence, the claimants' automobiles have been severely damaged, or totally wrecked, or stolen. In such instances, respondent should have had little or no difficulty in investigating and paying the involved claims. However, such has not been the case. (I.D., p.11.)

In connection with his discussion of this paragraph, the ALJ made reference to the claims audit conducted for AAACON by Mr. Raphael J. Janer and Mr. William Boone, both of whom testified for respondent. The ALJ found that OCCA rebuttal testimony highlighted errors of omission and commission in the testimony of Mr. Janer and Mr. Boone with respect

to numerous claims files, and, in the circumstances, the ALJ indicated that he had no confidence in the claims audit conducted by these gentlemen. (I.D., p. 13.)

With regard to paragraph 5, concerning the practice of attempting to impose responsibility on shippers' insurance carriers for loss of or damage to property received by respondent to transportation, the ALJ's findings include the following:

> The record is replete with evidence of claimants being told to go to his or her own insurance company. If claimants did not, AAACon would utilize certain tactics which would have the effect of "stalling" or delaying the settlement of the claim. One such tactic would be to request certain documents or information seriatim; and on occasions, respondent would make a second or third request for the same document or information, even though the claimant had complied with the initial request or had included the document or

> information with the original written claim. Another such tactic was merely to delay, delay, and delay; and these delays oftentimes had the effect of discouraging claimants and causing them to accept a very low offer from AAACon when respondent subsequently made an offer of settlement. AAACon would then utilize the intervals of delay to attempt to locate insurance coverage of some type, held by either the registered owner or someone else. (I.D., p.13.)

The ALJ also concluded that, "AAACon makes a successful claimant 'pay a price.'" (I.D., p. 15.) The ALJ further found that, since the effective date of the Commission's cease and desist order, respondent has continued to engage in practices prohibited by paragraph 6, namely, advertising that it insures for liability without disclosing to prospective shippers the precise kind and type of insurance carried, including deductible amounts, or advertising that it bonds its drivers, without making

clear what type of bond is provided and the kind and manner of protection to its shippers. The ALJ found that respondent's advertising practices "run the entire gamut of misleading information concerning the level of insurance coverage offered." (I.D., p. 16.) Four examples of misleading newspaper and telephone directory advertisements from 1977, 1978, and 1979, as well as a portion of the letter respondent sends to potential customers, were cited.

The ALJ also found the record to be replete with violations of provisions of paragraphs 7 and 8. Paragraph 7 concerns the investigation and screening of casual drivers, as well as the keeping of detailed records of the results of such investigations. Paragraph 8 concerns the instructing and controlling

of agents and drivers so as to preclude the abuse or misuse of shippers' automobiles. The ALJ opined that these paragraphs involve the most crucial aspects of successful deliveries of vehicles in driveaway service. (I.D., p. 22.) He found, however, that drivers' references are not checked, records are falsified, known unreliable drivers are utilized, and drivers who contract with AAACon on a trip basis are in full control of the customer's vehicle. The results of the lack of control, it was found, are (1) delayed deliveries of vehicles, (2) excess mileage, (3) unauthorized use of vehicles, (4) the necessity of having to wait until the vehicle normally would be delivered before determining that the automobile has been stolen, and (5) at times, damage to the vehicle because delivery was not

made upon the reaching of the destination city. (I.D., p. 26.) Paragraph 9 proscribes the misrepresenting of the identity of various personnel with whom the shipper deals on matters relating to claims. It was found that AAACon's Los Angeles office manager, Mr. Gene Matz, routinely used fictitious names when dealing with shippers and their claims and that, similarly, Ms. Ryar, office manager of the Hempstead, NY, office also used a pseudonym in dealing with a claimant. (I.D., pp. 26-27.)

While the first nine paragraphs of the cease and desist order relate to customer abuse, the tenth pertains to abuse of regulatory constraints. Operations beyond the scope of respondent's authority are proscribed. Specifically, respondent was ordered to cease and desist from transporting

automobiles moving to automobile dealers. The ALJ found that numerous violations of this proscription had been committed. Not only did respondent move automobiles to automobile dealers, it also transported a pickup truck and a motorcycle and, in violation of a restriction contained in its authority, transported shippments which had a prior movement by water. It was also found that respondent engaged in cover-up activities, such as the recording of false information on bills of lading, in attempts to conceal its unlawful activities. (I.D., pp. 29-30.)

The ALJ went on to make a number of observations regarding witness demeanor and credibility which, we believe, merit accentuation. He found that the witnesses sponsored by OCCA, for the most part, "exuded an air of verisimilitude." (I.D., pp. 32, 45.) He

also found corroboration for much of their testimony. AAACon officials Mr. Blackman and Mr. Silvestri, however, it was found, "like so many other witneses sponsored by respondent, dissipated their credibility to a large degree by giving testimony that does not comport with reality, common sense, and the overwhelming evidence of record." (I.D., p. 34.) The ALJ found respondent's own documents, letters, and exhibits to be amoung the evidence most damaging to its contentions and allegations. The ALJ particularly depreciated Mr. Silvestri's statement embodied in exhibit 528, finding it "insidious" in the manner in which it,

> (1) "upgrades" only the facts favorable to AAACon to the point of being dishonest, (2) "downgrades" or omits those facts unfavorable to AAACon, (3) omits facts important to the claimant, or "downgrades" those facts, and

> (4) gives inconsistent or unequal treatment and weight to certain similar facts or incidents. (I.D., pp. 34-35.)

The ALJ found this document to be basically a microcosim of the entire evidence submitted by respondent in this proceeding.

The ALJ found it informative to review the 49 steps alleged to have been taken by respondent following the effective date of the Commission's cease and desist order. The value of a number of steps was found to be minimal at best and illusory at worst. Misplaced efforts, failures to follow through, and emphasis on procedures contrary to shippers' interests were found. In adversely commenting on one of AAACon's 49 steps, the ALJ declared,

> This hearing has impressed upon this judge that AAACon and its personnel have an unusual ability for taking certian rules, facts,

> etc., and bending them (redescribing them, redefining them, and applying or not applying them) to their benefit and against common sense, the customers' interest, and basic justice. (I.D., p. 38.)

The ALJ concluded that, while AAACon has taken some of the 49 steps, these steps, singly or collectivelly, do not bring respondent into complience with the Commission's cease and desist order. (I.D., p. 41.)

In sum, the ALJ found in respondent an attitude of "the public be damned." (I.D., pp. 33, 35.) He observed that,

> The Commission's cease and desist order should have served as a "Sword of Damocles" and provided the necessary impetus for respondent to modify its treatment of customers and bring its operations into conformance with the applicable rules and regulations. (I.D., p. 43.)

He found, however, that AAACon has "thumbed its nose" at the Commission's cease and desist order and that

respondent has "made more sophisticated its methods of delaying, discouraging, denying, and decreasing the claims filed by dissatisfied customers. (I.D., p.43.) The ALJ concluded that willful, repeated violations of the cease and desist order had been established by overwhelming evidence.

CONTENTIONS ON APPEAL

On appeal, respondent advances arguments in 11 areas. 4/ First, AAACon argues that OCCA's investigation denied it due process. A failure to conduct an impartial investigation is alleged. Next, it is argued that the removal of Administrative Law Judge Benice was improper. Third, it is argued that the oral hearing denied respondent

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4/ We have re-arranged respondent's basic points of appeal in such a manner as to facilitate proper and adequate discussion and consideration.

due process. Fourteen alleged errors or improper actions by Administrative Law Judge Sarbacher are advanced. Fourth, respondent argues that the initial decision was unlawfully altered. Specifically, respondent challenges the ALJ's modification of his sanction to include all the operating authority held by respondent. Fifth, it is averred that the initial decision misconstrues carrier claims handling functions. Next, AAACon contends that no willful practices occured. In support of this argument, respondent discusses random sample audits, representativeness of claims, error rates, and comparisons of its conduct with that of other carriers. Next, AAACon contends that it has evidenced an intent to comply and to correct errors. It avows that the evidence demonstrates its intent to

comply, that it has taken affirmative steps to achieve compliance, and that it has compensated all witneses and dissatisfied claimants. Eighth, it is argued that the initial decision miscontrues the effect of the changes AAACon has initiated. Next, AAACon avows that the initial decision misconstrues released rates and insurace coverage. Arguments regarding the propriety of "benefit of insurance" clauses are discussed in relation to this contention. Tenth, respondent argues that this case does not warrant the sanction of revocation. Lastly, respondent argues that the initial decision fails to recognize the effect of its determination on the public, including employees and agents of respondent.

In reply, OCCA asserts that respondent was accorded due process prior

to, during, and after the oral hearings. Regarding the scope of the sanction, OCCA argues that the ALJ's clear intent was that respondent's operating authority should be revoked, and the notice issued subsequent to the service of the initial decision contained merely a technical change. With respect to AAACon's contentions that no willful practices occurred, OCCA avows that the willfulness is clear on the record. It argues that there is no such thing as a de minimus standard that would excuse non-compliance on the basis of a small number of violations, and it asserts that respondent raises an error rate statistic in an attempt to obscure the fact that its violations were willfully committed. OCCA argures, also, that the initial decision did not misconstrue AAACon's claims handling function or changes it

has initiated. Additionally, OCCA contends that, contrary to respondent's assertions, not all claimant-witnesses have been compensated or had their claims resolved. OCCA replies, also, that respondent's released rates and insurance coverage provisions have not been misconstrued. With regard to released rates, it is argued that AAACon's limitation of liability does not comply with the Motor Carrier Act of 1980 or with the Commission's cease and desist order. It is alleged that AAACon had disregarded both standard practice and Congressional policy and that its motive has been to relieve itself of the obligations imposed by the cease and desist order. Regarding benefit of insurance provisions, it is argued that, as applied by AAACon, the provisions violate the cease and desist order. OCCA

contends that AAACon had intentionally abused the benefit of insurance provisions in such a manner as either to delay unreasonably the processing of claims or avoid its responsibility for loss or damage. OCCA takes the position that this proceeding clearly warrants a revocation of respondent's authority since respondent has willfully violated every provision of the cease and desist order on numerous occasions over the course of many years. It is asserted that respondent has not demonstrated the ability or desire to comply with regulation. Finally, regarding the effect on the public, OCCA asserts that numerous other carriers, including intervenor, are available to serve the public. Additionally, OCCA asserts that there is no evidence in the record regarding the number of respondent's

agents or employees but that the record shows that the majority of agents testifying had sources of income unconnected with their agency.

Intervenor, in its reply, argues that the reassignment of this proceeding to a second hearing officer was lawful and that the Commission decision of January 25, 1980, articulated in detail the reasons for a hearing de nevo. Regarding the inclusion of all of respondent's operating authority in the sanction of revocation, intervenor contencs that respondent is reigning suprise that all of its operating authority was involved. It is a novel approach, intervenor asserts, for AAACon to contend that this proceeding relates only to a cancelled certificate and that the issues are actually moot. Intervenor avows that the Commission has recognized

that the Sub-No. 1 certificate is the keystone of all of respondent's operating authority. Intervenor argues, further, that the Commission or its hearing officer may reopen a proceeding at any time. Regarding the willfulness of AAACon's violations, intervenor cites as examples the demonstrated deliberate attempts to circumvent restrictions in operating authority and the evidenced misleading advertising. Intervenor asserts that the record justifies revocation of authority. It is argued that not only are no mitigating circumstances shown, but also that the upshot of respondent's program of changes is to develop a scheme whereby predatory and unlawful business practices may be better masked. Intervenor argues, finally, that a revocation will have a beneficial impact on the public. It names 20 competing carriers which it asserts

hold authority identical to that of respondent and itself.

DISCUSSION AND CONCLUSIONS

The evidence of record, the initial decision, the appeal, the replies, and other pleadings as indicated above have been considered. We find the statement of facts in the ALJ's initial decision to be substantially correct in all material respects and, as modified and supplemented in this decision, we adopt it as our own. We have reviewed the ALJ's salient findings and observations above, and, except as necessary for clarity of discussion, we will not further restate facts of record.

First, we find no merit in AAACon's assertions that OCCA's investigation denied it due process, that the removal of Admistrative Law Judge Benice was improper, or that the hearing conducted

by Administrative Law Judge Sarbacher denied it due process. Respondent argues that OCCA failed to conduct an impartial investigation, in that it sought to find evidence of violations. Respondent asserts that a random sample method could have been used and that favorable as well as unfavorable material should have been considered. AAACon undoubtedly would have OCCA discover evidence of as few violations as possible. We, on the other hand, must find whether and to what extent any willful violations of the Commission's cease and desist order have been committed. We see nothing improper about OCCA's investigation, and we have not been shown that respondent has been given less than a fair opportunity to present any favorable or exculpatory material. We cannot conclude that AAACon had been prejudiced by OCCA's apparent

loss of files containing reports of complaints regarding AAACon filed with the Commission. Such files clearly were not used as a basis for any findings in this proceeding. Further, respondent does not explain how any material which might have been in such complaint files could have contained any relevant mitigating facts which respondent itself would not have in its possession.

AAACon argues that Administrative Law Judge Benice was improperly "removed." Its entire argument is based upon a mischaracterization. Judge Benice was not "removed." He entered an initial decision, exceptions were filed, and Division 1, as then constituted, vacated the initial decision and reopened the proceeding for hearing de novo. In reassigning the proceeding for hearing before a different Administrative Law

Judge, the Commission exercised its power conferred by 49 U.S.C. 10305 to change or rescind a delegation of authority at any time. The section of the Administrative Procedure Act cited by respondent, 5 U.S.C. 556(b), which permits a presiding employee to disqualify himself, clearly is not relevant. Particularly lacking in merit are arguments that Judge Benice developed a full hearing record, that the "wrongful removal" of a judge is especially important where, as here, credibility of a witness is at issue, and that a judge's removal cannot be based on his substantive rulings. As clearly indicated in the decision of January 25, 1980, just a single witness testified for a part of 1 day, scarcely any evidentiary record was developed, and few of what might be termed substantive rulings were made. The reassignment for hearing before

a different Administrative Law Judge was properly made based on the reasons noted in the cited decision.

AAACon compares and contrasts several of Judge Benice's rulings with those of Judge Sarbacher, presumably in an attempt to demonstrate that the former was fairer than the latter. The differences in judges' handling of motions and procedural matters does not serve to show that a proceeding was improperly set for hearing de novo or that the second Administrative Law Judge did not conduct a fair hearing. Administrative Law Judge Sarbacher indicated in his initial decision that,

> during the course of the hearing and at the prehearing conferences, this judge informed the parties that it was his determination to get the merits of this case; that he intended to give priority to requests of the parties which had the effect of advancing the hearings with respect to the merits

> of the case; and that he did not want the hearings to be side-tracked or derailed by allegations and charges which were not pertinent to the proceeding. (I.D., p. 42.)

Judge Sarbacher also candidly stated that he did not believe that the record was totally free of error, but he concluded that any errors committed were "not of the nature and number which would support respondent's allegation [on brief] that it has been denied a fair hearing and due process." (I.D., p. 42.) We agree with Judge Sarbacher, and cannot conclude that a fair hearing was denied.

AAACon argues that the "findings" in the decision of January 25, 1980, created a climate of bias and impaired the impartiality of Judge Sarbacher. We see nothing to support such an allegation. Neither the Administrative Law Judge's ultimate conclusions nor his strong expressions of disapproval of respondent's violations in and of themselves show manifest bias, hostility, or prejudice. Compare, National Freight, Inc., Ext.- Georgia to 8 States, 130 M.C.C. 158 (1978).

AAACon proceeds to list 14 alleged errors of Judge Sarbacher which assertedly violated its right to due process. However, it presents nothing that establishes that its right to due process was violated. Indeed, in view of a number of obvious inaccuracies, distortions, and omissions in

respondent's specifications of error, we are unsure of the extent to which many of the allegations form valid bases for worthwhile comment. For instance, it is argued that the ALJ deemed himself bound not to consider any offers of settlement. The ALJ's consideration and rejection of an Offer of Settlement (at page 31 of his initial decision) belies this allegation. Also, in one specification of error, AAACon complains of having been denied an opportunity to present oral direct testimony, while, in another of its specifications, it complains that the ALJ refused to allow it rebuttal witnesses. Inasmuch as most of respondent's approximately 80 witnesses presented oral testimony, its arguments that it was unable to present both oral direct tesimony and rebuttal witnesses make no sense. AAACon also argues that

the ALJ mischaracterized a motion for reconsideration as an unauthorized interlocutory appeal. No specifics whatsoever are presented regarding this matter, and we thus are precluded from considering it.

To the extent the remaining arguments are understandable, we have the following comments. The fact that the ALJ might not have specifically referred to certain testimony or exhibits clearly does not demonstrate that he ignored or failed to consider such evidence in reaching his decision. Decisions of the ALJ relating to procedural matters, such as the contracting of public witnesses and the taking of depositions (discussed above), do not appear to have prejudiced

respondent. 5/ Rather, they appear to reflect the proper exercise of the ALJ's authority in furtherance of his efforts to advance an already unduly protracted proceeding and to reach the merits of the case. The ALJ's ordering that copies of his initial decision be sent to the Better Business Bureaus is, admittedly, out of the ordinary. Such action does not, however, equate with a denial of due process, and respondent has contacted the same Better Business Bureaus to offer its explanation for the decision. Allegations that the ALJ improperly modified his initial decision after it was served and that he improperly refused to allow

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5/ The contents of the supplemental evidence which respondent has sought to introduce and which we have rejected support a conclusion that respondent was not precluded from effectively cross-examining witnesses at the oral hearing.

respondent to discuss the records of other carriers will be discussed in connection with other arguments of respondent.

AAACon advances a number of arguments in support of its position that its Sub-No. 1 certificate is the only one involved in this proceeding and that the ALJ acted unlawfully in amending his decision so as to include all of respondent's authority. Before proceeding to a consideration of such arguments, we believe it would be worthwhile to outline the scope and background of respondent's certificates.

It was operations under AAACon's Sub-No. 1 certificate which gave rise to the original investigation and subsequent issuance of the cease and desist order in this proceeding. That certificate, served December 23, 1966, authorizes the

transportation of

> used passenger automobiles, in driveaway service, in secondary movements, with or without baggage, personal effects, and sporting equipment, between points in the United States (including Alaska but excluding Hawaii), restricted against the transportation of any traffic (1) having a prior movement by rail or water, (2) moving on government bills of lading, or (3) moving to automobile dealers.

The Sub-No. 1 certificate was the only certificate respondent held when an order reopening this proceeding for further hearing was entered February 9, 1978. On October 18, 1977, respondent filed an application for authority to transport used automobiles, in wrecker service, from points in Mississippi to Memphis, TN. The proceeding was docketed as AAACon's Sub-No. 7. By an order served February 15, 1978, the same date as the service date of the above-referenced reopening order, the then Bureau of Investigations and Enforcement was

directed to participate in the Sub-No. 7 application proceeding. An oral hearing was held before a joint board, but, at the hearing, AAACon and the Bureau stipulated that the Bureau would not present evidence regarding applicant's fitness, but would do so in the investigation proceeding instead. There subsequently was entered an initial decision recommending a grant of the sought authority but withholding the issuance of a certificate pending the outcome of the investigation proceeding. The Commission later determined not to withhold the certificate, and it was issued July 23, 1979.

On October 16, 1979, respondent filed a petition for modification in Sub-No. 1 (M1F). AAACon sought the removal from its Sub.-No. 1 certificate of the restriction precluding movements to

automobile dealers. While this petition was pending, on April 25, 1980, AAACon filed a petition for modification in Sub-No. 1 (M2F). In the latter proceeding, it sought the deletion of the limiting modifier "used" from the description of automobiles it could handle pursuant to its Sub. No. 1 authority. Intervenor here, Auto Driveaway, participated in both modification proceedings and advanced arguments and motions regarding AAACon's fitness.

While both the modification petitions were pending before a Review Board, on February 11, 1981, AAACon filed its Sub-No. 8X application. Therein, AAACon sought to take advantage of the Commission's then new, expedited restriction removal procedures before the new Restriction Removal Board. Intervenor appeared in that proceeding, also,

expressing concerns that, "through similar and simultaneously filed multiple applications, AAACon would successfully circumvent and subvert" the still pending investigation proceeding. The Restricion Removal Board, in a decision served April 20, 1981, granted the application and indicated that the attached certificate would become effective 45 days after the service date of its decision. The attached certificate, which specified that it superseded the Sub-No. 1 certificate, authorized the transportation of transportation equipment, with or without baggage, personal effects, and sporting equipment, between points in the United States. Subsequently, in decisions entered June 17 and July 10, respectively, Appellate Division 2 and the Restriction Removal Board denied various appeals and motions

of intervenor primarily regarding AAACon's fitness and the pendency of the investigation proceeding. The division stated that, "we believe that all questions concerning applicant's supposed illegal operations should be resolved solely within the context of [the investigation proceeding]..."

At this jucture, the modification proceedings in Sub-No. 1 (M1F) and Sub-No. 1 (M2F) were still pending. AAACon could have sought their dismissal as moot, or the Commission could have ordered them dismissed on its own motion. Nevertheless, both proceedings continued on to final disposition, and the latter passed the former in processing. On August 6, 1981, then, the Commission served the Sub-No. 1 (M2F) certificate modifying the (already superseded) Sub-No. 1 certificate and indicating that the

Sub-No. 1 certificate was cancelled as modified by decision served May 26, 1981 (in the Sub-No.1 (M2F) proceeding). Subsequently, on August 26, 1981, the Commission served the Sub-No. 1 (M1F) certificate, again modifying the (already superseded) Sub-No. 1 certificate and indicating that the Sub-No. 1 (M1F) certificate included the modification made in the previously served Sub-No. 1 (M2F) certificate.

As noted, respondent now argues that only the Sub-No. 1 certificate was and is the subject for concern in this investigation proceeding. Did respondent believe that, beginning with the effectiveness of the Sub-No. 8X certificate, the Commission was conducting a meaningless exercise with a view toward the possibility of imposing a meaningless sanction? Did respondent

believe that, in declining to delay the proceeding of its applications pending resolution of the investigation proceeding, the Commission was ignoring the purport of the investigation and taking action which would undermine it? These questions must be answered in the negative. Indeed, it appears that respondent is disingenuous in claiming that it did not know that all of its authority, particularly the authority which sprang from the Sub-No. 1 certificate, was and is within the scope of the investigation.

Respondent argues that the proceeding is limited in scope as specified in the Commission's orders of April 7, 1976, and February 9, 1978. Respondent, on the dates those orders were entered, held no authority other than that in its Sub-No. 1 certificate,

and it would have been meaningless surplusage to refer to any other authorities. Regarding respondent's reference to the requirements of the Administrative Procedure Act at 5 U.S.C. 554(b), we conclude that respondent has, in fact, had proper notice of the "nature of the hearing," the "jurisdiction under which the hearing is to be held," and the "matters of fact and law asserted." AAACon argues, also, that the Commission could have expanded the proceeding as was requested by intervenor. The Commission believed it would have been improper to delay the processing of AAACon's petitions and applications based on a pending investigation proceeding. Without doubt, AAACon would vigorously protested [sic] had the Commission taken such a step. Moreover, the Commission deemed it unnecessary to notify the

parties that it was "expanding" the investigation proceeding, since it appeared obvious that all of respondent's authority was in issue. AAACon argues, further, that the Commission determined the scope of the investigation through its rulings in the above-cited application and petition proceedings. Again, the Commission determined that it would be improper to delay the disposition of AAACon's application and petition proceedings. As seen, the ultimate disposition of an investigation proceeding may consume several years.

AAACon goes on to argue that its Sub-No. 8X certificate "clearly is not part of these proceedings." Its arguments in this area have no merit. In this connection, respondent cites the decision in Stewart Trucking Co., Inc. - Transferee-Transferor, 127 M.C.C. 793

(1982), for the proposition that restriction removal "X" certificates exist independently of the certificates which underlie them. Indeed, the cited decision holds precisely the opposite. In finding that X certificates must be transferred together with the authority they supersede, the Commission, at page 796, found that an X certificate embraces superseded authority. "Thus," the Commission found, "there is an evolutionary relationship between restriction removal and superseded underlying authority; the former is based upon an expansion of the latter."

Respondent goes on to argue that the ALJ exceeded his authority in "recalling" or "amending" his initial decision after issuing it. In a similar vein, it is argued that the Commission may not expand sanctions after the close

of the record. We disagree that sanctions were "expanded" or that the ALJ lacked authority to amend his decision prior to the due date for appeals. The ALJ's failure to specify all of respondent's authority was error. Had the ALJ not recognized and corrected his error, we could have modified his findings to reflect the fact that all of respondent's authority is involved.

As noted above, in petition and application proceedings initiated during the pendency of this investigation proceeding, intervenor expressed concern that respondent might successfully circumvent and subvert this proceeding. Respondent will not succeed in any such tactic. Its having availed itself of procedures for modification or restriction removal cannot be used as a tool to evade sanctions. Moreover,

contrary to respondent's contentions that alleged violations relate only to the Sub-No. 1 certificate, it is clear that its violations pervade all its operations. The record reveals violations from border to border and coast to coast, in a wide variety of aspects of respondent's operations. Consumer abuse, harassment, and fraud are not limited to a single certificate. AAACon's disregard and apparent contempt for the public are pervasive.

We next turn to respondent's arguments that the initial decision misconstrues carrier claims handling functions. This section of AAACon's appeal is at once disconcerting and revealing. AAACon does not discuss any one carrier's claims handling function; rather, it advances an argument that claims handling in general has a

"difficult and error-prone nature." AAACon euphemizes, referring to the evidence of violations as "errors" and "a series of uncaught mistakes." However, many of the demonstrated violations, pertaining not only to claims processing but also to areas including advertising, investigating drivers, controlling drivers and agents, and operating under appropriate authority, could scarcely be termed errors or uncaught mistakes. AAACon proceeds to discuss many of the representative examples of violations set forth by the ALJ, and attempts to mitigate, excuse, or explain away each violation. However, AAACon's process of review ignores the facts that the ALJ repeatedly has stated that the examples listed are only representative, and he has made many cross-references, reflecting his findings that single fact

patterns demonstrate violations of various paragraphs of the cease and desist order. AAACon's analysis also contains numerous mischaracterizations, distortions, and significant omissions. A review of a number of the fact patterns (primarily involving claims) discussed by AAACon proves quite informative.

Under the heading of paragraph 2, AAACon avows that the denial of the claim of LaGrand Steel was based on an evaluation and investigation of the age and excess mileage on the vehicle's engine and that the record shows that the vehicle had more than 100,000 miles on it. AAACon ignores the statement of a mechanic that the involved Mercedes Benz, abandoned by its driver in Billings, MT, en route from New York, NY, to Portland, OR, had been driven without water and oil. Under the heading of paragraph 3,

AAACon discusses the claim of Bruce Rhodes, asserts that it began processing the claim as soon as the damage to the vehicle occurred, and asserts that a settlement offer was made within 1 month of AAACon's receipt of estimates from its outside independent adjuster. The facts as discussed in the initial decision show that the vehicle was delivered in a damaged condition on or about July 27, 1979, a claim was filed on or before August 15, 1979, AAACon thereafter made numerous requests seriatim for certain information and documents, a first settlement offer was not made until December 3, 1979, and a second was not made until May 5, 1980.

With respect to violations of paragraph 5, AAACon argues that "Judge Sarbacher relies heavily upon the testimony of Robin Diaz,...a disgruntled

former employee, seeking revenge." AAACon goes on to argue that Ms. Diaz's testimony was rebutted. However, contrary to respondent's premise, it is quite clear that the ALJ did not place heavy reliance on the testimony of Ms. Diaz. As is noted in our discussion above, the ALJ found that "the record is replete with evidence of claimants being told to go to his or her own insurance company." He also found that AAACon would utilize "stalling" tactics if claimants did not go to their own insurers. (I.D., p.13) With regard to the claim of Dr. Lopez, AAACon asserts that it was his choice to resort to his insurance company. The facts surrounding the claim of Dr. Lopez show that he encountered significant difficulties in dealing with AAACon. An AAACon driver mistakenly took Dr. Lopez's automobile

from a Hempstead, NY, parking lot and drove it to Los Angeles, CA. When the circumstances became known to Dr. Lopez, he turned to his insurance company when AAACon refused to ship his automobile back to New York on a trailer rather than have it driven back.

In its arguments under paragraph seven, AAACon again asserts that the initial decision relies heavily on the testimony of a former employee, Ms. Holly Patrick. However, the ALJ clearly did not rely heavily on Ms. Patrick's testimony; he found the record to be replete with evidence of violations of this paragraph requiring thorough investigation and screening of drivers. (I.D., p. 18.)

Under its discussion of paragraph 8, AAACon attempts to excuse the violation regarding the Koury automobile,

asserting that the driver went off his route only because of a family emergency and that the vehicle was re-dispatched to him because no other driver was available at the time. The facts surrounding the Koury incident show that AAACon's driver drove the automobile from Atlanta, GA, to Miami, FL, rather than to the destination point of San Pedro, CA. The automobile was left at the AAACon Miami office for approximately 2 weeks, and AAACon's Miami office then entrusted the vehicle to the same driver again. The vehicle was delivered in a damaged condition with some 2,177 excess miles on the odometer. However, the fact that AAACon would turn over a customer's automobile to a driver a second time after knowing that the driver had disobeyed his original instructions is indefensible.

With regard to violations of

paragraph 9, AAACon argues that the initial decision expands the scope of that paragraph, and that testimony reveals that all of AAACon's agents, employees, and claims personnel utilize their legal names in their business capacities. However, contrary to AAACon's assertions, the paragraph is not limited to "claims personnel." By terms of the paragraph, AAACon was required to cease and desist from misrepresenting the identity of an officer, employee, or agent with whom the shipper deals on matters relating claims. The record clearly whows that AAACon's Los Angeles office manager and its Hempstead office manager both misrepresented their names to claimants.

Finally, under paragraph 10, AAACon refers to the unlawful shipment of automobiles from its Hollywood, FL, agent

to Kings Park, NY. AAACon asserts that the unrefuted testimony of the agent, regarding the cessation of the shipments, was erroneously characterized in the initial decision as a cover-up. However, this allegation clearly has no merit. The ALJ found that, "the record is unclear as to whether the...shipments had terminated because of a lack of traffic, or because of a sincere desire of respondent not to transport such traffic or whether it was a deliberate paper cover-up." (I.D., p. 30.)

We must re-emphasize that, in our above discussion of this section of respondent's appeal, we have given only a few representative examples of what we find to be numerous mischaracterizations, distortions, and significant omissions pervading respondent's analysis of the ALJ's examples of violations. We find

the ALJ's examples to be substantially accurate in their entirety.

Next, we turn to respondent's arguments on appeal that no willful practices occurred. However, before proceeding to a consideration of respondent's arguments, we believe that we should discuss the meaning of "willful." In United States v. Illinois Central R. Co., 303 U.S. 239, 243 (1938), one of the landmark cases involving the interpretation of the term "willful" in statutory enactments, the Supreme Court stated:

> We are persuaded that it means purposely or obstinately and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirement.

The Commission has long been guided by this definition. See e.g., Ace Lines,

Inc., Suspension or Revocation of Certificates, 76 M.C.C. 667, 668-669 (1958), and Georgia-Florida-Alabama Transp. Co.-Investigation, 125 M.C.C. 41, 45 (1976). In Midwest Emery Freight System, Inc.-Control and Merger, 101 M.C.C. 19 (1965), in specifically applying Illinois Central to the provisions of the Interstate Commerce Act regarding the suspension of a certificate, the Commission, at page 30 stated,

> "Willful" as used in this section does not mean with evil purpose, criminal intent, or the like. A willful violation may result from continuous intentional disregard or indifference to the requirements of the law.

Also, we point out that it is well settled that a corporation can act only through its employees. The acts of its employees, within the scope of their employment, constitute the acts of the corporation, and a corporation thus can

be guilty of willful violations of regulatory statutes. United States v. T.I.M.E. - D.C., INC., 381 F. Supp. 730, 738-739 (W.D. Va. 1974), and Steere Tank Lines, Inc. v. United States, 330 F.2d 719 (5th Cir. 1963). The Commission applied this doctrine in North American Van Lines, Inc. - Invest. & Revoc. of Certifs., 132 M.C.C. 66 (1980). In that proceeding, the Commission emphasized,

> the Interstate Commerce Act provides for regulation of the carrier, not of its individual employees, and clearly places the responsibility for compliance upon the carrier. A carrier cannot escape this responsibility by attributing violations to its employees or agents. [132 M.C.C. at page 71.]

Indeed, the courts have gone so far as to hold that willful violations can be found in the failure of employees to continuously make certain of compliance. See, United States v. Paramount Moving

and Storage Co., 479 F. Supp. 959, 965 (M.D. Fla. 1979), and compare, United States v. John Henricks, Inc., 388 F.2d 677, 679 (7th Cir. 1968). With these points in mind, we turn to respondent's arguments that no willful practices occurred.

Throughout those arguments, AAACon repeatedly refers to "claims handling errors," "claims," "complaints," and "mistakes." However, many of the violations shown to have been committed clearly arose from intentional disregard of, or plain indifference to, the requirements of the cease and desist order. Respondent's repeatedly referring to violations as errors does not serve to alter their nature as violations. AAACon also attempts to limit the focus of the complaint to violations involving claims handling. However, the violations in the

areas of bill of lading provisions (paragraph 1), advertising (paragraph 6), and unlawful transportation (paragraph 10) clearly are unrelated to claims handling. The violations in the area of the investigation and screening of drivers (paragraph 7) and the instruction and control of agents and drivers (paragraph 8), similarly, are not directly related to claims handling. Throughout its arguments, then, AAACon seeks to remove from consideration five of the 10 paragraphs of the cease and desist order.

AAACon argues that OCCA erred in failing to demonstrate that the evidenced claims errors were representative. It challenges what it terms OCCA's "sifting" process, and it cites the testimony of a statistics expert in support of its argument that a random sampling of files

should have been taken. We do not find this argument to be valid. Many of the violations found to have been committed were not reflected in AAACon's records. It was only through the examination of files which suggested problems that the Commission was able to uncover (largely through contacting claimants) evidence of multiple violations.

Examination of files, alone, does not uncover violations of an undocumented nature. For instance, the record reveals that AAACon personnel used fictitious names in dealing with claimants, and it was only through contacting claimants which [sic] encountered problems, not through examining files, that such violations were, or could be uncovered. As seen in the record, bills of lading and driver investigation forms were falsified, and the violations which the

original documents might have revealed would never have been found merely by examining files. Similarly, actions which had the effect of discouraging the filing of claims, would not be reflected in respondent's files, and abuse, deceit, or harassment of consumers would not be reflected.

AAACon argues that independent sources, such as Better Business Bureaus and a shipper oriented auditing firm, Freight Traffic Services, confirm that AAACon has a low error rate level. Again, audits of the type to which respondent refers are likely to leave many violations undisclosed. Moreover, the audits cover only a 3 year period in the 1980's. An examination of respondent's activities in the years immediately following the February 9, 1978, reopening of this proceeding would

be more informative, as would an examination of its activities in the years following respondent's July 28, 1976, filing of its Certificate of Compliance. AAACon also cites what it terms "outside sources of verification" other than the two above-named. It contends that the independent sources show that complaints against AAACon have radically dropped over the past years. Even if the sources were reliable, and even if their limited focus on complaints were acceptable, still, the focus on the recent past is not acceptable. Respondent would have us ignore evidence of its acitivities from August 1976 until, it appears, the early 1980s. This we will not do.

AAACon goes on to argue that a willful practice is not proven by a small group of errors occurring over a period

of 6 years. It contends that the 45 claim situations of record represent only one-half of one percent of AAACon's claims for the period examined. This argument is meritless in that it ignores several facts. First, as previously noted, the Administrative Law Judge invoked the cumulative evidence rule and did not allow OCCA to present all its evidence of violations.6/ Second, the 45 claim situations discussed involved hundreds of violations. Third, as discussed above, it is not reasonable to expect that all violations regarding

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6/ The parties have brought at least one additional claim to our attention in their discussion of case law regarding released rates. The claim of Thomas K. Reed, Jr. is the subject of Reed v. AAACon Auto Transport, Inc., 637 F.2d 1302 (10th Cir. 1981). We note that, in that proceeding, the 10th Circuit, at page 1307, held that it could not find clear error in the District Court's findings that AAACon was guilty of "reckless conduct" in the handling of Reed's automobile and "dilatory and wanton conduct" in treating Reed's claims.

claims handling can be found from an examination of respondent's records. Finally, also as discussed above, many of the evidenced violations did not involve claims.

Based on the premise that its violation rate is less than one percent, AAACon proceeds to argue that the courts have held that, as a matter of law, a one percent violation rate does not constitute willful violation. In support of its position, it cites Aero Mayflower Transit Co. v. ICC, 535 F.2d 997 (7th Cir. 1976), and North American Van Lines, Inc. v. United States, 412 F. Supp. 782 (N.D. Ind. 1976). However, the courts' holdings in these proceedings do not support AAACon's position.

In Aero Mayflower, the court found, at page 1001, that the Commission had erroneously applied a standard that

admits absolutely no deviation. It noted, at page 998, that 18 of the 22 violations by Aero Mayflower arose out of a mutual and reasonable misunderstanding. Regarding violations by Allied Van Lines, Inc., the court noted, at page 1002, that the facts surrounding the violations forcefully suggested the absence of willfulness and that the record of Allied demonstrated affirmative effort, not plain indifference. In North American, the court found, at page 800, that the Commission itself had repudiated a requirement of 100 percent compliance, but it found that the Commission had not promulgated a compliance level. The court did not, as AAACon suggests, set a specific acceptable level. Rather, it appeared to suggest that a case-by-case analysis is appropriate.

We conclude that a case-by-case

approach is appropriate, and that the setting of a standard of an acceptable level of violations is not practicable. For one, while we understand that perfection might not be achievable, we do not wish to convey the impression that we think it unimportant for carriers to strive to reach peak levels in all areas. Second, and more important, the setting of a specific acceptable level of violations would ignore the different types of violations. Technical violations or violations in the area of documentation differ greatly from violations of provisions of a cease and desist order such as involved here. Additionally, violations regarding matters of safety or dealings by a carrier directly with consumers differ greatly from violations in areas such as conducting operations beyond the scope of

operating authority. Moreover, a percentage of violations is but one indicator of a carrier's willingness to comply with regulation. Particularly in a proceeding of the type before us, the protection of the public and the promotion of the goals of the National Transportation Policy require far more than the simple examination of percentages.

Finally, AAACon argues that we must compare its rate of claims handling errors with the rates of other carriers to arrive at a standard of conduct. For the reasons indicated immediately above, as well as for the reasons specified in our prefatory remarks, we reject this argument. Moreover, we emphasize that these other carriers are not operating under the constraints of a cease and desist order.

AAACon contends that it has evidenced an intent to comply and to correct errors. First, AAACon asserts that it has compensated all claimant-witnesses and all dissatisfied claimants it has been able to find in reviewing all claims for the past 3 years. Respondent asserts that it has evidenced an attitude fully indicating its desire to comply and that it has made a genuine effort to correct any errors or wrongs in claims or overcharges. OCCA, in reply, asserts that AAACon has not, in fact, compensated all claimants. In any event, we deem AAACon's action in this area at this juncture to be little more than an eleventh hour palliative. Moreover, as emphasized above, claims handling is but one of respondent's problem areas.

AAACon also avows that many of the affirmative steps it took to achieve

compliance were adopted after the "settlement conference" before Administrative Law Judge Benice in 1979. It asserts that the decision of Administrative Law Judge Sarbacher fails to give significance to these changes and that the accusations against it often concern matters allegedly occurring during the period from 1976 to 1979, "when no standards or guidelines were available." Such arguments are of little merit. The cease and desist order itself should have served as a guide for respondent, and belated steps taken in the face of possible revocation of authority can hardly be viewed as strong indicators of a continuous intent to comply with the Commission's order.

AAACon alleges that the initial decision ignores evidence of affirmative steps demonstrated in exhibits such as

those containing copies of various directives it issued from 1977 to 1982. Additionally, AAACon lists 46 steps which it asserts it has taken and which allegedly demonstrate a concern with compliance and rebut any suggestion of indifference or willful intent to commit violations. First, as previously noted, the fact that particular testimony or exhibits were not mentioned in the initial decision does not indicate that such matter was not considered. Matter which has been rebutted, outweighed, or found to be of little merit need not in all instances be discussed, and the failure to discuss it does not equate with a failure to consider it. Having examined respondent's documents and the 46 steps listed in its appeal, we arrive at conclusions much the same as those of the ALJ. The actions of AAACon personnel

are far better indicators of intention than are directives, memoranda, and "steps" aimed at compliance. Indeed, many of the listed steps were not initiated until 1979 or later, and many were of questionable value. We simply do not find substantial evidence of an intent to comply, and, as we have stated before, respondent's actions belie its avowed intentions.

AAACon contends also that the initial decision misconstrues the effect of changes it has made. In support, respondent briefly discusses its calendaring system, its offering of a toll-free telephone number for claims and the acceptance of collect calls from drivers, its provision of before and after" odometer readings (since November 1979), its use of an excess mileage compensation formula, its undergoing of

audits, and its offering of independent arbitration. In essence, AAACon simply disputes the ALJ's assesment of the value of these changes.

We find two portions of this argument that demand comment. First, AAACon asserts that the inital decision is incorrect, as a matter of law, in stating that claims must be determined within 120 days. Respondent asserts that, "the regulations merely require that, if settlement cannot be achieved in 120 days, notice of that fact be sent to the claimant." Respondent's view of the regulation at 49 CFR 1005.5 is inaccurate and unduly lax. The regulation requires that a carrier which receives a claim, "shall pay, decline, or make a firm compromise settlement offer...within 120 days after receipt of the claim...." The regulation adds,

> provided, however, that, if the claim cannot be processed and disposed of within 120 days after the receipt thereof, the carrier shall at that time and at the expiration of each succeeding 60-day period while the claim remains pending, advise the claimant...of the status of the claim and the reason for the delay in making final disposition thereof.

One could reasonably have expected that respondent would have familiarized itself with this regulation. Second, and of unclear relevance, AAACon argues that the initial decision improperly ignored the fact that the Commission had eliminated the so-called "dealer restriction" in the Sub-No. 1 certificate for the reason that the restriction was impossible to interpret or enforce. AAACon concludes, then, that its transportation of vehicles to dealers did not constitute violations. This is casuistic argument. The record clearly reflects that AAACon concocted a scheme to evade the dealer restriction

and that it falsified bills of lading as part of its scheme. The subsequent removal of the restriction does not serve to negate the violations.

AAACon argues that the initial decision miscontrues released rates and insurance coverage (benefit of insurance) provisions. In his discussion of AAACon's "49 steps," the ALJ briefly discussed respondent's released rates program and found it to be of little value to the consumer. (I.D., p. 40.) At page 16 of his initial decision, the ALJ made a single, very brief reference to AAACon's benefit of insurance clause, specifying a situation in which AAACon had failed to fulfill its obligations under the clause. The ALJ made not pejorative comments regarding the benefit of insurance clause per se. The relative merits of, and respondent's use

of, the involved released rates and benefit of insurance provisions do not form a basis for the Administrative Law Judge's ultimate findings, and no in-depth analysis of these provisions is necessary. Respondent's arguments in these areas, however, prompt us to make several observations.

The Motor Carrier Act of 1980 added to 49 U.S.C. 10730 subsection (b) which permits a carrier to,

> ...establish rates for the transportation of property... under which the liability of the carrier for such property is limited to a value established by written declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation.

AAACon put into effect a released rates program under this provision, articulating the extent of its liability. The program, AAACon asserts, "provided a

significant breakthrough in permitting shippers to obtain the sort of coverage they desired, while not burdening the general shipping public with the cost thereof." AAACon indicates that its released rate provisions have been made in writing, in bold print, which every customer receives in advance of shipment. However, we are constrained to agree with the ALJ that the program is of questionable value to the public. While AAACon has amended its tariff to limit its liability, it has not lowered its costs. Rather than entering into an agreement with AAACon whereby a lower rate is paid in exchange for decreased carrier liability, a shipper actually enters into an agreement whereby it pays a standard rate for limited liability. The shipper must understand the provisions of the shipping documents and

pay an additional tariff charge if it wishes AAACon to assume full liability. The failure of a shipper to become fully apprised of the situation, for whatever reason, works to the benefit of respondent. We need not resolve the issue, raised by OCCA, of whether AAACon has manipulated the statute in such a manner as to violate the cease and desist order. We simply conclude here that the initiation of a released rates program does not demonstrate an affirmative effort to comply.

A benefit of insurance clause is one in which the carrier claims the benefit of the insurance the shipper carries on his automobile. In United States v. Auto Driveaway Co., 464 F.2d 1380 (7th Cir. 1972), the court found that a benefit of insurance provision does not unlawfully limit a carrier's

liability, and thus is valid, when the provision does not invalidate the shipper's insurance policy and the carrier reimburses the shipper for his premium. See, also, Mohl v. NTC of America, Inc., 564 F. Supp. 401 (D. Colo. 1982), and Travelers Indemnity Co. v. Auto Driveaway Co., 278 NW 2d 262 (Wis. 1979). It appears that AAACon takes the position that, pursuant to a benefit of insurance provision, it can require a shipper to turn to its insurer before looking to AAACon for settlement of a claim. We note, however, that in Auto Driveaway, supra, at pages 1382-83, the court noted that the clause presupposes the carrier's liability for the loss and does not exempt it from that liability. The court noted that, "the clause permits the Company to recover from the customer the proceeds of the

insurance paid him." (Emphasis added.) Obviously, in those situations in which the benefit of insurance clause is valid (it has not voided the shipper's insurance), a carrier would have nothing to recover unless it has first made a payment. Contrary to respondent's position, then, the court's holding appears to require a carrier first to honor a claim and then to seek reimbursement. In any event, we disagree with respondent's contentions that the initial decision suggests that the use of the benefit of insurance clause violates paragraphs two and five of the cease and desist order. The ALJ has cited numerous instances in which AAACon's activities such as delay, unresponsiveness, and lack of cooperation forced claimants to turn to their own insurers. Again, the ALJ has not found per se fault with AAACon's

benefit of insurance provisions.

AAACon argues that revocation of authority is not warranted. Clearly, pursuant to 49 U.S.C. 10925(b), the Commission has the power to revoke a carrier's certificates for willful failure to comply with a Commission cease and desist order. This proceeding was reopened with a view toward possible revocation, and it is within this Commission's discretion to determine whether the sanction of revocation is necessary to eliminate the unlawful and proscribed activities in which respondent has been found to have engaged. Jacob Siegel Co. v. FTC, 327 U.S. 608, 612-613 (1946). We recognize that we are charged with a heavy responsibility to tailor the "remedy" to the particular facts of each case. Gilbertville Trucking Co. v. United States, 371 U.S. 115 (1962). See,

also, Federal Highway Admin. v. Safeway Trails, Inc., 113 M.C.C. 815 (1971). With these points in mind, we are constrained to conclude that revocation is the appropriate sanction to be applied in this proceeding.

The record reveals that even the entry of the cease and desist order in 1976 did not dissuade AAACon from continuing to engage in activities of the type proscribed. Indeed, it appears that respondent simply masked certain prohibited activities and continued them. Consumer fraud, abuse, and harassment continued. AAACon points to alleged improvements beginning in 1978, 1979, 1980, or thereafter, but, as previously noted, improvements, or the trappings of improvements, became more apparent as the prospect of severe sanctions grew. Most telling is respondent's total lack of

contrition. Nothing is admitted. Even the most obviously reprehensible violations are ignored, distorted, mischaracterized, or excused. AAACon's purported willingness and ability to comply with the cease and desist order is belied again and again by its actions, its testimony, and its arguments. Respondent, far from demonstrating compliance, has shown disdain and contumacy. We find the ALJ's findings in this regard to be supported by substantial evidence, and we agree with his ultimate finding that revocation is warranted.

Respondent contends that one of the ALJ's rationales for revocation was his belief that the Commission might be "sunsetted" in the near future. It is argued that the Commission would be abrogating its duty as a regulatory body

if it were to revoke respondent's authority simply because the Commission will not always be in existence to monitor respondent's activities. However, the dicta at page 43 of the initial decision, to which respondent refers, does not constitute a rationale for revocation. The ALJ's reasons for recommending revocation are clearly set forth at several points in his initial decision. In the main, the ALJ found that revocation was warranted in view of overwhelming evidence showing repeated, willful violations. In the referenced paragraph regarding "sunsetting," the ALJ voiced his concern regarding delays and effective relief for the consuming public. He, therefore, recommended that the Commission take actions including the seeking of injunctions and the providing of assistance to consumer units. Again,

we cannot conclude that the ALJ's speculation regarding the future of the Commission served as a basis for his ultimate conclusions. In any event, inasmuch as we independently have determined here that AAACon's egregious violations of the cease and desist order warrant revocation, the point is moot.

Finally, AAACon advances an argument that the initial decision fails to recognize the effect its determination will have on the public. In a very brief argument, respondent asserts that revocation of its authority will put more than 500 AAACon personnel out of work and will leave the public without significant competition. First, there is nothing in the record to suggest any significant number of AAACon personnel will be left out of work as a result of our decision. Indeed, the record tends to indicate that

many, if not most, of AAACon's agents engage in more than one business. Regarding the competition argument, intervenor has shown that it, and numerous other carriers, conduct services of the type AAACon offers. Moreover, relaxed entry standards make it possible for new carriers to fill such a void in service as may come to exist. Most important, we must disagree with the premise that the initial decision does not consider the public. To the contrary, the public welfare is the frequent focus of the ALJ's findings and comments. We are constrained to agree with the ALJ that the removal of AAACon from the marketplace will redound to the public benefit, not its detriment.

Except as otherwise indicated in this decision, there are no new or material matters of fact or law not

adequately considered and properly disposed of by the ALJ in his initial decision. Any matters raised by the pleadings and not discussed herein have been considered and found not to warrant specific disposition.

This decision does not significantly affect the quality of the human environment or conservation of energy resources.

We find:

The findings of the Administrative Law Judge are modified and supplemented to reflect the matters dealt with in this decision. Except as indicated herein, the evidence considered in light of the pleadings does not warrant a result different from that reached by the Administrative Law Judge. The statement of facts, conclusions, and findings of the Administrative Law Judge, as modified

and supplemented in this decision, are proper and correct in all material respects and are affirmed and adopted as our own.

It is ordered:

Respondent's request for oral argument, embraced in its appeal, is denied.

Respondent's motion to waive the requirement for timely filing of petitions is dismissed as moot.

Respondent's motion to strike material in responsive pleadings, and the requests for official notice, embraced in the motion, are denied.

Respondent's motion to have the Commisssion take official notice of its public complaint files is denied, and the embraced tendered supplemental evidence is rejected.

Respondent's Offer of Settlement is rejected.

Respondent's motion to adduce additional evidence is denied, and the embraced tendered supplemental evidence is rejected.

The petitions for leave to intervene filed by Isidore Gittler, Stephen J. Walter, and Jack Pieper, are denied.

Respondent's motion to dismiss is denied.

Respondent's motion to waive the rule against a reply to a reply is denied, and its tendered reply is rejected.

The tendered motion of the Office of Compliance and Consumer Assistance to strike (reject) the above reply is rejected.

Respondent's authority in No. MC-125808 (Sub-No. 1), issued December 23, 1966, (Sub-No.7), issued July 23,

1979, (Sub-No. BX), issued April 20, 1981, and effective June 4, 1981, (Sub-No. 1) (M2), issued August 6, 1981, and (Sub-No. 1) (M1), issued August 26, 1981, is revoked, effective 60 days from the date of service of this decision.

A copy of this decision will be served upon each of the Councils of the Better Business Bureau, Inc., named in Appendix L to the initial decision served February 28, 1983.

This proceeding is discontinued.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett and Gradison.

James H. Bayne
Secretary

(SEAL)

APPENDIX

Pertinent paragraphs of the Commission's cease and desist order:1/

(1) It is ordered, That the respondent AAACon Auto Transport, Inc., be, and it is hereby, notified and required to cease and desist from the utilization of bills of lading which incorporate unreasonable provisions and which incorporate provisions which are at variance with

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1/ These paragraphs comprised the cease and desist order recommended by Administrative Law Judge Reilly in his initial decision entered November 15, 1973. As discussed in the decision entered by Division 1 on January 25, 1980, in this proceeding, the various fine points of these paragraphs were incorporated by implication in the cease and desist order entered by the then constituted Division 1 on April 7, 1976, in its decison affirming the findings of Administrative Law Judge Reilly. See, AAACon Auto Transport - Invest. &-Revoc. of Certif., 124 M.C.C. 493 (1976). The paragraphs have been numbered here to facilitate discussion.

those of the Uniform Bill of Lading filed with the Commission as a portion of its tariff, and specifically any provision of any bill of lading utilized by the company which provides for compulsory arbitration of loss, damage, or injury claims in New York City, subject to the laws of New York State, or any other similar provision which would limit the venue in which a claimant could pursue its claim against the respondent.

(2) It is further ordered, That the respondent be, and it is hereby, notified and required to cease and desist form policies which negate its common carrier responsibility for the property in its possession for transportation, including the assumption of liability for the full, actual loss or damage to that property, as required by sections 219 and 20(11) [of the Interstate Commerce Act].

(3) It is further ordered, That the respondent be, and it is hereby notified and required to cease and desist from its policy of not promptly and throughly investigating and processing claims and further orders [sic] that the respondent make and keep detailed records of the results of such investigation.

(4) It is further ordered, That the respondent be, and it is hereby, notified and required to cease and desist from arbitrarily denying claims when the facts available to it are inconsistent with denial.

(5) It is further ordered, That respondent be, and it is hereby, notified and required to cease and desist from attempting to impose responsibility on its shippers' insurance carriers for loss of or damage to property it receives for transportation.

(6) It is further ordered, That respondent be, and it is hereby, notified and required to cease and desist from advertising that it insures for liability in any amount unless it discloses to prospective shippers the precise kind and type of insurance carried, including deductible amounts, or that it bonds it drivers, unless it is made clear what type of bond is provided and the kind and manner of protection to its shippers.

(7) It is further ordered, That the respondent be, and it is hereby, notified and required to cease and desist from the employment of casual drivers utilized by it without thorough investigation and screening, and it is ordered to make and keep detailed records of the results of such investigation.

(8) It is further ordered, That the respondent be, and it is hereby, notified

and required to cease and desist from its policy of not properly instructing and controlling its agents and drivers so that shippers' autos will not be abused or used for any purpose other than transportation from and to the origin and destination points by the most direct routes.

(9) It is further ordered, That the respondent be, and it is hereby, notified and required to cease and desist from misrepresenting the identity of its officer, employee, or agent, with whom the shipper deals on matters relating to claims.

(10) It is further ordered, That the respondent be, and it is hereby, notified and required to cease and desist from the performance of any operations in interstate or foreign commerce found herein to be unlawful or unauthorized,

specifically the transportation of autos moving to automobile dealers, and thereafter to abstain and refrain from the resumption of any such operation unless and until appropriate authority therefor is obtained.

(11) It is further ordered, That upon the willful failure of respondent to comply with any of the provisions of this order, the certificate issued to the respondent, AAACon Auto Transport, Inc., in No. MC-125808 and sub-numbers thereunder, may be suspended or revoked in whole or in part.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D.C. on the 7th day of April 1976.

No. MC-C-7287

AAACON AUTO TRANSPORT, INC.--
INVESTIGATION AND
REVOCATION OF CERTIFICATE

No. MC-C-7287 (Sub-No. 1)

AAACON AUTO TRANSPORT, INC., PETITION FOR
DECLARATORY ORDER

No. FF-359

AUTO TRIP USA, INC., FREIGHT FORWARDER
APPLICATION

Investigation of the matters and things involved in these proceedings having been made and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof

It is ordered, That the petitions filed by AAACon Auto Transport, Inc. and Auto Trip USA, Inc. on November 5, 1973, May 17, 1974, January 16, 1975, and September 2, 1975 seeking leave to introduce additional evidence and the petitions filed by AAACon and Auto Trip filed March 13, 1975, and September 5, 1975 proposing offers of settlement be and they are hereby denied for the reasons set forth in the said report.

It is further ordered, That in No. MC-C-7287 respondent AAACon Auto Transport Inc., be, and it is hereby ordered and required to cease and desist, and thereafter refrain and abstain from all of those practices found in the said report to be unjust and unreasonable in violation of sections 20(11), 219 and 216(b) of the Interstate

Commerce Act, as well as those operations, in interstate or foreign commerce, of the character found in said report to be unlawful.

It is further ordered, That on or before the effective date of this order, respondent AAACon Auto Transport, Inc., pursuant to Rule 99 of the Commission's General Rules of Practice (49 CFR 1100.99), shall notify the Commission, by affidavit, of the extent of its compliance with the preceeding paragraph, serving a copy of such affidavit on the Bureau of Enforcement of the Interstate Commerce Commission, and that at any given time thereafter, further consideration may be given the matter herein involved, by further proceeding under section 212(a) of the act, to determine whether Certificate No. MC-125808 (Sub-No. 1), held by respondent

AAACon Auto Transport, Inc. shall be suspended or revoked for willful failure to comply with this order.

It is further ordered, That in No. MC-C-7287 (Sub. No. 1), the petition for a declaratory order be, and it is hereby, denied.

It is further ordered, That on further consideration in No. F-F-359, the applicaitons be and it is hereby denied and that the prior order of August 25, 1970, in that proceeding be, and is hereby, vacated and set aside.

And it is further ordered, That the statutory effective and compliance date of this order be, and it is hereby, fixed as June 1, 1976

By the Commission, Division 1

ROBERT L. OSWALD

Secretary

(SEAL)

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-C-7287

AACON AUTO TRANSPORT, INC.,
INVESTIGATION AND
REVOCATION OF CERTIFICATE

Decided: January 25, 1980

We have considered the record in this proceeding, the initial decision of the Administrative Law Judge entered November 13, 1979, and the following:

(1) Exceptions of Auto Driveaway Company, intervener, [sic] filed December 17, 1979;

(2) Exceptions of the Bureau of Investigations & Enforcement, filed December 26, 1979, embracing a motion for waiver of Rule 97(b)(3) [49 C.F.R. 1100.97(b)(3)] to permit the filing of a pleading which is in excess of 30 pages in length;

(3) Reply by respondent, AAACon Auto Transport, Inc., to intervener's [sic] exceptions in (1) above, filed December 31, 1979, embracing a motion to strike portions of the exceptions in (1) above;

(4) Motion of Auto Driveaway Company, intervener, [sic] to strike portions of respondent's reply in (3) above, filed January 3, 1980;

(5) Reply by respondent, AAACon Transport, Inc. [sic], to the Bureau's exceptions in (2) above, filed January 7, 1980, embracing a motion for waiver of Rule 97(b)(3) [49 C.F.R. 1100.97(b)(3)] to permit the filing of a pleading which is in excess of 30 pages in length, and also embracing a motion to strike portions and all of the exceptions in (2) above;

(6) Supplemental reply by respondent, AAACon Auto Transport, Inc., to the Bureau's exceptions in (2) above, filed January 11, 1980, and consisting solely of revised pages 9 and 9A to the reply in (5) above.

This investigation an revocation proceeding was first instituted by an order dated March 18, 1971, for the purpose of determining among other things, whether respondent was engaging in unjust and unreasonable practices in connection with matters relating to the transportation of automobiles, in driveaway service. In an initial decision entered November 15, 1973, Administrative Law Judge Joseph A. Reilly found that respondent had been in violation of certain provisions of the Interstate Commerce Act, and he therefore issued a cease and desist order. The

proceeding was taken on exceptions to Division 1. In a report and order entered April 7, 1976, AAACon Transport - Invest. & Revoc. of Certif., 124 M.C.C. 493 (1976), Division 1 essentially affirmed ALJ Reilly's initial decision. Division 1's order, 1/ as pertinent, directed respondent to cease and desist, and thereafter refrain and abstain, from all of those practices found in the report to be unjust, unreasonable, and unlawful. Respondent thereafter petitioned for reopening and reconsideration, but its petition was denied by Division 1, Acting as an Appellate Division, and the effective and compliance date of Division 1's order was set at August 3, 1976 [sic].

1/ This order itself does not appear in the 124 M.C.C. bound volume; only the report was reproduced. All parties received the order, however, and it is included in the public docket.

Respondent took its cause to the U.S. Court of Appeals for the Second Circuit, but the Commission's action was sustained.

This proceeding was reopened by an order dated February 9, 1978, for the purpose of determining whether respondent had willfully failed to comply with Division 1's order. The reopened proceeding, which was assigned to the oral hearing docket and heard by Administrative Law Judge J. Lee Benice, has been the subject of drawn-out discovery and extensive pre-hearing conferences (for 4 days). This was followed by extensive hearings (for 15 days), "in-chambers" negotiations (for an unknown number of days 2/) at which a compromise settlement acceptable only to

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2/ We note, among other things, the Bureau's assertion (see its exceptions in (2) above, at p. 6) that there were 20 days of these off the record discussions.

ALJ Benice and respondent was negotiated, and a 16th day of hearing held only to put the compromise settlement on the record. In an initial decision entered November 13, 1979, ALJ Benice accepted respondent's "offer of settlement" (see EX 57) over the Bureau's objections, for the reasons set forth on the front page of the initial decision.

This proceeding is now before us on the exceptions.

MOTIONS TO STRIKE

Respondent, at pp. 22-23 of its reply in (3) above, moves to strike certain portions of the intervener's [sic] exceptions in (1) above. The assailed material consists of: (a)intervener's [sic] reference, at pp. 6-7 of its exceptions, to the prepared statement of the Bureau's proposed witness Louis Bussolati, Jr., see EX 51

and EX 52; (b) intervener's [sic] reference, at p. 10 of its exceptions, to a federal court case involving repondent; and (c) intervener's [sic] reference, at pp. 10-11 of its exceptions, to a letter written by respondent, dated November 2, 1979. Respondent suggests that the assailed material is, among other things, improper, irrelevant, confused, and erroneous.

Intervener [sic], in its motion in (4) above, asserts that several paragraphs in respondent's reply in (3) above are immaterial, irrelevant, and scandalous, and that they assert "facts" which are not correct. The assailed material consists of: (a) respondent's reference, at p. 18 of its reply, to certain anti-trust litigation; (b) respondent's reference, at pp. 18-19 of its reply, to the nature of respondent's

business as compared to the nature of intervener's [sic] business; and (c) respondent's reference, at p.19 of its reply, to the injury that a lengthy suspension of its authority would work on its employees and agents. Intervener [sic] urges us to strike the assailed material.

Respondent, in its reply in (5) above, moves to strike the Bureau's exceptions in (2) above as not properly filed, and, in the alternative, moves to strike those portions of the Bureau's exceptions in (2) above which assertedly are improper or constitute matters beyond the evidence in the record. We are of the opinion that the Bureau's exceptions were properly filed and served.

We will deny all of the motions. The assailed material has been properly brought to our attention to aid us in our consideration of the reasonableness and

propriety of the initial decision.3/

DISCUSSION AND CONCLUSIONS

Our "investigation and revocation" cases have generally centered on so-called "illegal" operations, i.e., interstate motor carrier operations conducted without proper authority. This case, while presenting that issue, is basically different, because it also involves certain unjust and unreasonable practices allegedly engaged in by respondent against its "shippers." These differ from the customers of most motor carriers and are shippers only in a technical sense. The common description

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3/ The complete absence of any "evidence of record" in the reopened proceeding is a factor in this decision. Intervener [sic] notes that the assailed material consists of statements not based on facts of record. There is no real evidentiary record in the reopened proceeding; but we cannot consider the initial decision in a complete vacuum.

of these people is "consumers", and this case centers on what is commonly called "consumer fraud."

The cease and desist order entered in 1973 by ALJ Reilly was a detailed list of specific injunctions directed against respondent. Because exceptions were filed, this order never became effective. The cease and desist order entered in 1976 by Division 1 is far more general than ALJ Reilly's order. The Division 1 order directs respondent to cease and desist from certain practices found in its report to be unlawful, but the report itself is fairly general in its discussion of these practices. Neither Division 1's order nor its report expressly incorporates ALJ Reilly's detailed prohibitions, although the list is featured as an appendix to Division 1's report. The question raised in the

reopened proceeding is whether the cease and desist order entered by Division 1 incorporates by implication all the various fine points of the cease and desist order entered by ALJ Reilly. We believe it did.

For us, the argument here is settled by the fact that both the Bureau and respondent initially understood, and acted upon the understanding, that the Division's order adopted the ALJ's injunctions. The Bureau, throughout, has maintained that respondent had to comply with the specifics of ALJ Reilly's order if it wished to bring itself into compliance with the general mandate of the Divisions's [sic] order. Respondent, in its compliance affidavit filed July 28, 1976, and also in its supplemental compliance affidavit filed December 9, 1976, undertook to explain what measures it was taking to bring itself into

compliance with ALJ Reilly's order. Respondent will not now succed with the argument that Division 1's order was essentially a nullity, too vague in its terms to command any sort of compliance.

ALJ Benice, in his initial decision, accepted respondent's "offer of settlement." The gist of the initial decision and the offer of settlement is that respondent would be made subject to a 10-day suspension of its operating authority and to a new cease and desist order. Respondent has admitted, but only for the purposes of its offer of settlement, that it has committed acts or omissions of the type which ALJ Benice's recommended order (Appendix B to his initial decision) is designed to prevent or correct. This admission cannot be used as the basis for a determination that respondent's past practices warrant a sanction more severe than a 10-day suspension; but this admission can be

used for the purpose of determining whether a 10-day suspension of respondent's operating authority would be an appropriate sanction for these past practices. Consideration of these practices is highly instructive, and leads us to conclude (but only for the purpose of acting upon respondent's offer of settlement) that respondent's systematic program of consumer fraud continued virtually unabated even subsequent to the effective date of the prior cease and desist order. Against this background, a 10-day suspension of respondent's operating authority at a time when business is very slow would be an insufficient sanction for its apparently flagrant violations of the prior cease and desist order. No sanction at all would be almost as appropriate.

We therefore have determined to reject respondent's offer of settlement, to vacate the initial decision, and to remand this proceeding for further hearing under the oral hearing procedure. We caution, however, that the conclusions we reached in the preceding paragraph are taken by us only for the purpose of acting upon respondent's offer of settlement. These conclusions are not based upon evidence in the technical sense, for there really is none as yet in the reopened proceeding; and these conclusions do not constitute any sort of "law of the case."

Three additional matters require our consideration.

First. The hearing held in the reopened proceeding lasted 16 days and generated 1,634 pages of transcript -- but no real evidence. There was but a single witness at the hearing. He was on

the stand on days 13, 14 and 15; but he was not in the limelight even then. The first 12 days of the hearing, and day 16 as well, were conducted without any witnesses at all. Nor was the absence of witnesses compensated for by stipulations as to their testimony -- there were no stipulations either. There was, instead, a war of attrition waged by respondent's counsel with motions, petitions, and objections for ammunition; and the transcript in the reopened proceeding is a monument to dilatory conduct.

This proceeding will be remanded for further hearing; but the course of events at the 16 days of the hearing already held and the hearing officer's apparent involvement in the settlement negotiations are compelling arguments in favor of reassigning this proceeding to another ALJ. The Office of Hearings, in due course, will select the ALJ who will

hear this case on the remand.

Second. The record in this proceeding suggests that respondent's lead counsel and the Bureau's lead counsel do not trust each other. This in itself was a cause of the delay in the progress of the hearings, because it led to unnecessary disputes as to prior conversations between the attorneys. There is a solution to this problem as far as the future is concerned. We will direct that counsel hold no further oral conversations out of the presence of an official reporter. For good measure, and because counsel took to stating on the record things stated in their many off-the-record conversations with ALJ Benice, we suggest that the succeeding ALJ hold no off-the-record conversations with counsel.

Third. In the closing moments of the final day of the hearing, November 2,

1979, ALJ Benice requested each counsel then present to state that he had not "surreptitiously recorded any of the conversations that any of us have had with one another, and that in any event no record or recording of any kind remains to their knowledge." Each counsel then present so stated. Se TR 1955-1956. This is, to say the very least, out of the ordinary. Our concern here is with the possibility that "surreptitous recordings" were in fact made, and, if so, whether their production may have entailed a violation of federal criminal law or our Rules of Practice. See particulary 18 U.S.C. sec. 2510 et seq, and 49 C.F.R. 1100.66(b). We will therefore direct the Commission's General Counsel and Ethics Counselor to look into this matter with a view to determining whether criminal acts possibly have been committed in the

course of a Commission proceeding and to take appropriate action thereafter.

It is ordered:

The motions for waiver of Rule 97(b)(3) [49 C.F.R. 1100.97(b)(3)(1978)], to permit the filing of the exceptions in (2) above and the reply in (5) above, are granted.

The motions to strike embraced within the replies in (3) and (5) above, as well as the motion to strike in (4) above, are denied.

Respondent's offer of settlement (its EX 57) is rejected, and the initial decision entered November 13, 1979, is vacated.

This proceeding is remanded for further hearing under the oral hearing procedure, at a time and a place, and a [sic] before a different ALJ, to be designated by the Office of Hearings.

Counsel for respondent and counsel

for the Bureau are hereby instructed to engage in no further oral conversations with each other out of the presence of an official reporter, and the subsequently assigned ALJ is advised to conduct all official business with counsel "on the record."

The Commission's General Counsel and Ethics Counselor is hereby instructed to look into the matter of "surreptitious recordings" to determine whether criminal acts and violations of our Rules have been committed in the course of a Commission proceeding and to take appropriate action thereafter.

By the Commission, Division 1, Commissioners Clapp, Gresham, and Trantum. Commissioner Trantum concurring with a separate expression.

(SEAL)

Agatha L. Mergenovich
Secretary

COMMISSIONER TRANTUM, concurring

In the circumstances of this proceeding, the action we are taking is clearly warranted. I am concerned, however, about the long-run implications of trying to regulate the auto driveaway business by cease and desist orders. As I recently pointed out to the Commission, AAACON and two other large auto driveaway firms are frequently the target of customer complaints. Their apparent service inadequacies and high rates of return indicate that the Commission should consider the possible public benefits of allowing greater entry and competitive pressure. The text of my memorandum of December 21, 1979, entitled "Inclusion of Auto Driveaway Industry in Ex Parte No. MC-135," follows.

The purpose of this memo is to request that the casual, secondary auto

driveaway industry be specifically addressed in Ex Parte No. MC-135. I believe that less regulatory intervention in this area may provide users with a wider range of rates and services than is now available.

This subset of the motor carrier industry is engaged in the transportation of used automobiles, generally for the convenience of individual owners and sometimes for companies engaged in repossession. Three of the largest companies are Auto Driveaway Co., AAACON Auto Transport, Inc. and Nationwide Auto Transporters, Inc. Data from their 1978 Annual Reports show a return on equity for Auto Driveaway of 46% and for Nationwide Auto of 55%. AAACON reported its return on equity at 10% but it should be noted that it did not take into consideration in its computation over $500,000 listed as a "management fee."

These carriers are given entry protection against potential competiton but are not subject to the public scrutiny common to rate bureau members. (A review of tariffs on file for three representative movements* conducted by the three carriers reveals virtually no rate disparity.)

User complaints about the three carriers center around claims, service and rates. Between January 1, 1978 and December 13, 1979, we logged 241 complaints against AAACON, only 106 of which were complaints over which we possess jurisdiction. During this same period, 112 complaints were logged against Nationwide, 73 of which were jurisdicitonal. Seventy-one of a total 112 complaints against Auto Driveaway were jurisdictional. Of the 250

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*Massachusetts to Rhode Island, New York to Illinois, Connecticut to California.

jurisdictional complaints, the ICC took administrative action in 52 cases.

Although we grant and deny certificates to carriers seeking to conduct driveaway operations, we have no information as to exactly who and how many carriers have ICC licenses to do so. We, therefore, have no mechanism by which to assess the effectiveness of regulation or the extent to which barriers to entry exist. To the extent that they do exist, inclusion in Ex Parte No. MC-135 would further our intent, expressed in Ex Parte No. MC-121, to give greater weight to the benefits of competition in motor carrier application and acquisition cases.

Freer entry may permit the marketplace to accomplish what regulation has not. Increased copetition may be the most appropriate vehicle to protect the public interest against inefficiency, rate abuse, and inadequate service.

APPENDIX C

STATUTES

5 U.S. Code Section 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(b) There shall preside at the taking of evidence
(1) the agency;
(2) one or more members of the body which comprises the agency; or
(3) one or more administrative law judges appointed under section 3105 of this title.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may --

(6) hold conferences for the settlement or simplification of issues by consent of the parties;

28 U.S. Code Section 1254: Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S. Code Section 2101: Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his applicaiton, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(g) The time for application for a writ of certiorari to review a decision of the United States Court of Military Appeals shall be as prescribed by rules of the Supreme Court.

28 U.S. Code Section 2350: Review in Supreme Court on certiorari or certification

(a) An order granting or denying an interlocutory injunction under section 2349(b) of this title and a final judgment of the court of appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided by section 1254(1) of this title. Applicaion for the writ shall be made within 45 days after entry of the order and within 90 days after entry of the judgment, as the case may be. The United States, the agency, or an aggrieved party may file a petition for a writ of certiorari.

(b) The provision of section 1254(3) of this title, regarding certification, and of section 2101(f) of this title, regarding stays, also apply to proceedings under this chapter.

49 U.S. Code Section 10322.
Commission action and appellate procedure in non-rail proceedings

(a) This section applies to a matter before the Interstate Commerce Commission over which the Commission has jurisdiction under chapter 105 of this title, other than a matter involving a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of such chapter, or section 10934 or 11501(e). The deadlines set forth in this section do not apply to the following sections of this subtitle: 10525(c), 10530, 10708(b), 10708(f), 10922(i)(2), 10922(i)(4), 10928, 10934(c), 10935, 11345a, and **11701(c)**...
(emphasis added)

(g)(3) If the Commission initiates any action under paragraph (1) of this subsection, final disposition under such paragraph shall be made not later than the 120th day following the date action is initiated.

(i) In extraordinary circumstances, the Commission may extend a time period established by this section, except that the total of all such extensions with respect to any matter subject to the provisions of this section shall not exceed 90 days.

49 U.S. Code Section 10925. Effective periods of certificates, permits, and licenses

(a) Each certificate, permit, and license issued under section 10922, 10923, or 10924 of this title is effective from the date specified in it and remains in effect except as otherwise provided in this section.

(c)(1) Except on application of the holder, the Commission may revoke a certificate or permit of a motor carrier or freight forwarder, or a license of a broker, only after the Commission has issued an order to the holder under section 11701 of this title requiring compliance with this subtitle, a regulation of the Commission, or a condition of the certificate, permit, or license of the holder, and the holder willfully does not comply with the order.

(3) The Commission may act under paragraph (1)... of this subsection only after giving the holder of the certificate, permit, or license at least 30 days to comply with the order.

49 U.S. Code Section 10934. Household goods agents

(c)(1) Whenever the Commission has reason to believe from a complaint or investigation that an agent providing household goods transportation services (including accessorial and terminal services) under the authority of a motor common carrier providing transportation of household goods subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title has violated section 11901(k) or 11917 of this title or is consistently not fit, willing, and able to provide adequate household goods transportation services (including accessorial and terminal services), it may issue to such agent a complaint stating the charges and containing notice of the time and place of a hearing which shall be held no later than 60 days after the service of the complaint to such agent.

(2) Such agent shall have the right to appear at such hearing and rebut the charges contained in the complaint.

(3) If such person does not appear at the hearing or if the Commission finds that the agent has violated section 11901(k) or 11917 of this title or is consistently not fit, willing, and able to provide adequate household goods transportation services (including accessorial and terminal services), it may issue an order to compel compliance with the requirement that the agent be fit, willing, and able.

Thereafter, the Commission may issue an order to limit, condition, or prohibit such agent from any involvement in the transportation or provision of services incidental to the transportation of household goods subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title if, after notice and an opportunity for a hearing, it finds that such agent, within a reasonable time after the date of issuance of a compliance order under this section, but in no event less than 30 days after such date of issuance, has willfully failed to comply with such order.

(4) Upon filing of a petition with the Commission by an agent who is the subject of an order issued pursuant to the second sentence of paragraph (3) of this subsection, and after notice, a hearing shall be held with an opportunity to be heard. At such hearing, a determination shall be made whether the order issued pursuant to paragraph (3) of this subsection should be rescinded.

(5) Any agent adversely affected or aggrieved by an order of the Commission issued under this subsection may seek relief in the appropriate United States court of appeals as provided by and in the manner prescribed in chapter 158 of title 28, United States Code.

(d) The antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12), do not apply to discussions or agreements between a motor common

carrier providing transportation of household goods subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and its agents (whether or not an agent is also a carrier) related solely to (1) rates for the transportation of household goods under the authority of the principal carrier, (2) accessorial, terminal, storage, or other charges for services incidental to the transportation of household goods transported under the authority of the principal carrier, (3) allowances relating to transportation of household goods under the authority of the principal carrier, and (4) ownership of a motor common carrier providing transportation of household goods subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title by an agent or membership on the board of directors of any such motor common carrier by an agent.

49 U.S. Code Section 11701. General authority

(c) A formal investigative proceeding begun by the Commission under subsection(a) of this section is dismissed automatically unless it is concluded by the Commission with adminstrative finality by the end of the 3d year after the date on which it was begun.

APPENDIX D

CONSTITUTIONAL PROVISIONS

AMENDMENT I

Freedom of Religion, Speech, and the Press; Rights of Assembly and Petition

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT 5

Rights in Criminal Cases

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E

MISCELLANEOUS

49 CFR Section 1111.1 Content of formal complaints; joinder

The complaint should contain a detailed statement of the relief requested. Relief in the alternative or of several different types may be demanded, but the issue raised in the formal complaint should not be broader than those to which complainant's evidence is to be directed at the hearing.

49 CFR Section 1113.3 Authority of officers.

(a) General. (1) The presiding officer has the authority to regulate the procedure in the hearing before him, and has authority to take all measures necessary or proper for the efficient performance of the duties assigned him. These include authority:...(v) to establish special rules of procedure appropriate to the effictive handling of the particular proceeding;...(ix) to hold conferences for the settlement and simplification of issues;...

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49 CFR Section 1113.8 Prepared statements.

With the approval of the officer, a witness may read into the record, as his testimony, statements of fact or expressions of opinion prepared by the witness, or written answers to interrogatories of counsel. A prepared statement of a witness who is present at the hearing may be received as an exhibit, provided that the statement does not include argument. Before any such statement is read or admitted in evidence, the witness shall deliver to the officer, the reporter, and to opposing counsel, as may be direct by the officer, a copy of such statement or of such interrogatories and the written answers thereto. The admissibility of the evidence contained in such statement will be subject to the same rules as if such testimony was produced orally, including the right of cross-examination of the witness. The officer may require that the witness testify orally if, in the officer's opinion, the memory or demeanor of the witness may be of importance.

49 CFR 1067 et. seq.

PART 1067—FITNESS FLAGGING PROCEDURES

Sec
1067.1 Definitions.
1067.2 Threshold occurrence signaling possible flagging issues.
1067.3 Standard for flagging
1067.4 Bureau of Investigations and Enforcement participation in application proceedings.
1067.5 Intervention by the Department of Transportation
1067.6 Flagging keyed to applications only.
1067.7 Show cause hearing
1067.8 Show cause hearing a temporary bar to issuance of authority.
1067.9 Failure to respond in show cause hearing
1067.10 Flagging decision
1067.11 Other flagging procedure initiation
1067.12 New application filed after flagging procedures initiated
1067.13 Processing pending applications
1067.14 Review of show cause and flagging order.
1067.15 Expedition.
1067.16 Adverse fitness finding
1067.17 Effect of adverse fitness finding on subsequent applications

AUTHORITY: 49 U.S.C. 5, 307, 309, 311, 313(b), 909(c), 906(g), 1010(c), and 5 U.S.C. 552, 553, 559.

SOURCE: Part 1067 added by Order 307 March 7, 1977, effective May 9, 1977, 42 F. R. 13705, unless otherwise noted

[¶ 858c]

§ 1067.1 Definitions.

For the purpose of this Part, the following definitions apply—

Fitness: An applicant's present or future willingness or ability to conform to the relevant provisions of the Interstate Commerce Act and the requirements, rules, and regulations of the Interstate Commerce Commission and the Department of Transportation (DOT).

Flagging: The result of a Commission decision that no certificate, permit, license, or authority to consummate a transaction shall issue to an applicant until a determination of that applicant's fitness has been resolved in the selected application proceeding.

Selected application proceeding: The application proceeding in which the fitness issue is being fully developed and formally contested by the Commission's Bureau of Investigations and Enforcement (Bureau) or the Department of Transportation. The Bureau or DOT may participate in the selected application proceeding alone or in an application proceeding consolidated with an investigation or complaint proceeding (the latter two being proceedings to determine the lawfulness or unlawfulness of conduct under the Interstate Commerce Act or the rules and regulations of the Commission or DOT, but in which the statutory question of fitness is not itself in issue).

Show cause hearing: A separate procedural step, initiated by order at the time the Commission decides to consider the flagging of applications. The purpose of this procedure is to determine whether there exists a nexus (cross-relation) between the fitness questions raised in the selected application proceeding on the one hand, and the fitness issue in any other pending application proceedings, on the other. This hearing, which will be handled on an expedited basis, will afford the applicant an opportunity to show cause why such a nexus does not exist as to any particular pending application and, therefore, why any such pending application should not be flagged.

Flagged applications: Those other pending applications of a carrier in which, after a show cause hearing, a nexus to the selected application proceeding on the issue of fitness has been determined to exist, and in which authority (or permission to consummate the transaction) shall be withheld until the issue of applicant's fitness is finally determined in the selected application proceeding.

[¶ 858c-1]

§ 1067.2 Threshold occurrence signaling possible flagging issues.

Either of the following occurrences may institute the flagging procedures set forth in this part:

(a) Institution of a formal Commission investigation into alleged violations of law that reasonably appear to bear on applicant's fitness, willingness, and ability to conduct regulated carrier operations and to conform to the provisions of the Interstate Commerce Act and the requirements, rules, and regulations of the Commission or DOT.

(b) Participation by the Bureau of Investigations and Enforcement or the De-

partment of Transportation to develop a record concerning fitness in an application proceeding seeking operating authority or approval of a transaction under section 5 of the Interstate Commerce Act.

[¶ 858c-2]

§ 1067.3 Standard for flagging.

Allegations by the Bureau or DOT challenging the fitness, willingness and ability of an applicant to conform to the provisions of the Interstate Commerce Act and the requirements, rules and regulations of the Commission or DOT, as to which there is probable cause for believing that ultimately the applicant will not be able to meet statutory requirements for favorable Commission action on an application for operating authority or for authority to undertake a financial transaction within the meaning of section 5(2) of the Act, including:

(a) Past uncorrected or other significant violations denoting an indifference by the applicant towards lawful standards of behavior, or a pattern of neglect of its duties towards the public that betokens a refusal voluntarily to meet its duties under the Interstate Commerce Act or

(b) Flagrant and persistent disregard of pertinent provisions of the Interstate Commerce Act or the requirements, rules, and regulations of the Commission or DOT, (rather than, for instance, a bona fide difference of opinion or interpretation regarding the applicant's rights).

[¶ 858c-3]

§ 1067.4 Bureau of Investigations and Enforcement participation in application proceedings.

(a) Upon its determination that it has information tending to put in question the fitness of an applicant, the Bureau of Investigations and Enforcement shall request that it be directed to participate in an application proceeding arising under any of the following sections of the Interstate Commerce Act: 5, 206(a)(6), 207, 209, 211, 212(b) (as made applicable under 49 CFR 1181.13), 309(c), 309(g), or 410(c). This request, which shall be made to the appropriate Division or to the Commission, shall include a summary of the evidence which the Bureau proposes to introduce in the context of the entire record. In considering the request, the appropriate Division or the Commission shall base its decision to direct the Bureau to participate on fitness upon the standards contained in § 1067.3. Upon a decision to order the Bureau to participate in an application proceeding, an appropriate order will be entered in the proceeding notifying the parties of the fitness participation.

(b) Upon the institution of a formal investigation proceeding involving issues bearing upon an applicant's fitness or qualifications, willingness and ability to conduct regulated operations, or to conform to the provisions of the Interstate Commerce Act and the requirements, rules and regulations of the Commission or DOT, the Commission, a Division of the Commission, or the Vice Chairman, as appropriate, will select a pending application (the selected application proceeding) of that applicant and by order direct the Bureau of Investigations and Enforcement to participate on the issue of fitness, if warranted.

[¶ 858c-4]

§ 1067.5 Intervention by the Department of Transportation.

(a) The Department of Transportation may participate in application proceedings on the issue of an applicant's fitness (by Memorandum of Agreement between the Commission and DOT, dated April 3, 1967, provision 2) by notifying the applicant and by filing a petition for leave to intervene setting forth generally the nature of the evidence it will present, within 30 days (protest period) of publication of a notice of such application in the FEDERAL REGISTER. DOT may also petition for leave to intervene in any show-cause hearing by filing a petition and verified written representations during the same 30 day period governing applicant in § 1067.7. In such a situation, applicant may reply thereto within 15 days of such filing. If the Department of Transportation has not petitioned to intervene on the issues of fitness and flagging under the above procedures, its subsequent participation may be authorized at the discretion of the Commission.

(b) This rule does not change in the Department of Transportation's right to file a formal complaint with the Commission or to petition the Commission to institute on its own motion a formal investigation proceeding, with respect to the activities and practices of a regulated carrier.

[¶ 858c-5]

§ 1067.6 Flagging keyed to applications only.

Show-cause flagging procedures, if any, will be undertaken only in applica-

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tion proceedings in which the Bureau of Investigations and Enforcement or the Department of Transportation is participating on fitness.

[¶ 856c-6]

§ 1067.7 Show Cause Hearing.

When the decision is made to consider the flagging of pending applications, in addition to any order authorizing the Bureau of Investigations and Enforcement or DOT to participate on the issue of fitness, a separate show-cause order will be issued It will state, in general, the statutes, requirements, rules, and regulations allegedly violated and the general substance of the allegations made and identify by individual docket numbers all of those pending application proceedings in which flagging is to be considered. The order, served and docketed in the usual manner, will require the Bureau of Investigations and Enforcement or the Department of Transportation within 15 days from its issuance to advise applicant, in writing, of the matters of fact and law to be asserted with sufficient particularity to make clear the violations alleged and the nexus alleged to exist between those violations and the application proceeding in which fitness flagging is being considered. Allegations of nexus may include, but are not limited to, such factors as commodity similarity, territorial similarity, the time frame of the alleged violations (whether isolated instances or a pattern of continuing violations), or the seriousness of the alleged violations in light of the authority sought. The order authorizing the Bureau of Investigations and Enforcement or DOT to participate on the issue of fitness or the separate show cause order shall afford applicant an opportunity to submit within 30 days from the expiration of the above-stated notice any verified written representations including facts and arguments tending to show cause why all or any of the applications identified in the order should not be flagged for fitness, and will afford the Bureau of Investigations and Enforcement or the Department of Transportation 15 days to reply to applicant's representations.

[¶ 856c-7]

§ 1067.8 Show cause hearing a temporary bar to issuance of authority.

The issuance of a show cause order, or an order authorizing fitness participation with like described show cause requirements does not constitute flagging but shall temporarily bar issuance of authority in any designated application proceeding for a period of no longer than 75 days after the issuance of such order within which period a decision on whether or not to flag the designated applications shall be made Any extension of time granted to applicant for any filing in the show cause hearing shall not be counted toward the 75-day period.

[¶ 856c-8]

§ 1067.9 Failure to respond in show cause hearing.

Failure of any applicant subject to a fitness flagging show cause order, or such provision in any order, to file verified written representations by the due date for such filing shall cause the designated application to be flagged and the parties will be so notified A copy of such notice will be placed in the docket of each of the applications designated as flagged.

[¶ 856c-9]

§ 1067.10 Flagging decision.

Upon determination that the applicant has shown that the fitness flag should not be raised or has failed to make such showing with respect to any or all of the designated applications the Commission or the appropriate Division thereof will issue an order setting forth its findings with respect to the standard contained in § 1067.3 and specify the particular applications to which those findings and the fitness flag if any, apply. Commission action on the flagging issue is not a decision on the question of applicant's fitness, and shall not be construed as such.

[¶ 856c-10]

§ 1067.11 Other flagging procedure initiation.

Should a determination be made that fitness flagging procedures are not warranted and a situation develops at a later stage of any proceeding that suggests that flagging appears appropriate, flagging may be presented as an issue upon formal petition under these same announced procedures.

[¶ 856c-11]

§ 1067.12 New application filed after flagging procedures initiated.

Where the Bureau of Investigations and Enforcement or the Department of Transportation has been authorized to participate in an application on the issue

of fitness flagging procedures have been initiated, a new application by the same applicant filed subsequent to the service date of the show cause order will by notice be added to the list of designated proceedings in the show cause order unless with the application there is filed a petition, a copy of which is served on the Bureau of Investigations and Enforcement or the Department of Transportation, as appropriate, to have that application excluded therefrom. The petition must set forth applicant's alleged justification for such exclusion. Action on the petition will be taken in the decision determining the application, and will be governed by the standard contained in § 1067.3.

[¶ 858c-12]

§ 1067.13 Processing pending applications.

All pending application proceedings affected by flagging consideration or designated as flagged will move forward toward a final disposition of all other issues, except that of applicant's fitness. Any proceeding that has otherwise reached administrative finality but has not resulted in the issuance of operating rights or, in the case of finance proceedings, authority to consummate the transaction, prior to its designation for show-cause fitness flagging consideration, will by such designation be reopened or held open for reconsideration on the issue of fitness until it is either determined that flagging is not warranted, the fitness issue is resolved, or the fitness flag is removed.

[¶ 858c-13]

§ 1067.14 Review of Show Cause and Flagging Order.

Applicant's filing of verified written representations under the show cause order serves as a prompt and adequate opportunity for Commission review of that order, and applicant's representation may include a prayer for reconsideration of the issuance of the show cause order, if applicant believes it appropriate. No separately-filed petition for reconsideration of the show cause order will be entertained. The decision on flagging will result in issuance of an order by the Commission or a Division thereof in all proceedings where flagging is contested and that order will be subject to petitions for reconsideration under the Commission's rules of practice and will be disposed of as promptly as possible.

[¶ 858c-14]

§ 1067.15 Expedition.

The selected application will be processed on an expedited basis to the extent consistent with the Commission's other responsibilities.

[¶ 858c-15]

§ 1067.16 Adverse fitness finding.

Where a pending application has been flagged, an administratively final determination that applicant has failed to show that it is fit in the selected application will provide a sufficient basis for disposition of all flagged applications. Following an administratively final ultimate finding unfavorable to applicant in the selected application proceeding all flagged proceedings will be denied by appropriate order.

[¶ 858c-16]

§ 1067.17 Effect of adverse fitness finding on subsequent application.

Following an administratively final fitness determination unfavorable to applicant, fitness participation in any of its subsequently filed applications and flagging will be considered on the same basis as the application of any carrier not previously found unfit, in accordance with the procedures announced herein. However, official notice of all prior findings is appropriate and may be found to bear on applicant's fitness.

[¶ 859—906]

[Subchapter B—Rules of Practice (49 CFR Parts 1100-1199) was revised and redesignated by the Interstate Commerce Commission effective November 1, 1982. 47 F. R. 49534. The revised rules are reproduced beginning at ¶ 15,001. A redesignation table appears at page 1201.]

[The next page is 7281.]

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CERTIFICATE OF SERVICE

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FILED
APR 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1322

In the Supreme Court of the United States

OCTOBER TERM, 1986

AAACON AUTO TRANSPORT, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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13 pp

TABLE OF AUTHORITIES

Cases: Page

Bradley v. *School Board*, 416 U.S. 696 (1974) 7
Burlington Northern, Inc. v. *United States*, 679 F.2d 915 (D.C. Cir. 1982) 6
Chevron U.S.A. Inc v. *NRDC*, 467 U.S. 837 (1984) 6
Curtis, Inc. v. *ICC*, 669 F.2d 648 (10th Cir. 1982) 6
FCC v. *Schreiber*, 381 U.S. 279 (1965) 4
Hunt Transportation, Inc. v. *ICC*, 636 F.2d 190 (8th Cir. 1980) 6
Louis J. Amato, In re, 367 I.C.C. 821 (1983) 6
Midwestern Transportation, Inc. v. *ICC*, 635 F.2d 771 (10th Cir. 1980) 6
National Steel & Shipbuilding Co. v. *Director, Office of Workers Compensation Programs*, 616 F.2d 420 (9th Cir. 1980) 9
Ramspeck v. *Federal Trial Examiners Conference*, 345 U.S. 128 (1953) 4, 5
Sharron Motor Lines, Inc. v. *United States*, 633 F.2d 1115 (5th Cir. 1981) 6
Watkins Motor Lines, Inc. v. *ICC*, 641 F.2d 1183 (5th Cir. 1981) 6

Statutes:

Administrative Procedure Act, 5 U.S.C. 551:
5 U.S.C. 556(b) (§ 7(b)) 4, 5
5 U.S.C. 3105 (§ 11) 4
Interstate Commerce Act, 49 U.S.C. 10101:
49 U.S.C. 10305(a) 4
49 U.S.C. 10925(b)-(c) (§ 212(a)) 2, 8
49 U.S.C. 11701 8
49 U.S.C. 11701(a) (§ 204(c)) 2, 8
49 U.S.C. 11701(c) 5, 6, 7, 8
49 U.S.C. (Supp. II 1978) 11701(c) 7
Motor Carrier Act of 1980, Pub. L. No. 96-296, § 26(a), 94 Stat. 818 (49 U.S.C. 11701(c)) 5

Statutes—Continued: Page

Pub. L. No. 94-210, § 303(b), 90 Stat. 50 6
§ 17(14)(a), 49 U.S.C. (1976 ed.) 17(14)(a) 6, 7
§ 17(14)(b), 49 U.S.C. (1976 ed.) 17(14)(b) 7

Miscellaneous:

Examining Current Conditions in the Trucking Industry and the Possible Necessity for Change in the Manner and Scope of Its Regulations: Hearings on H.R. 6418 Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation, 96th Cong., 2d Sess. Pt. 3 (1980) 7

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The court of appeals found that overwhelming evidence supported the Interstate Commerce Commission's decision to revoke all of petitioner's operating authority because of its persistent consumer abuses in violation of the agency's 1976 cease and desist order. Petitioner does not dispute the substantiality of the evidence but seeks review of claimed procedural infirmities.

1. Petitioner was a common carrier licensed by the Interstate Commerce Commission to transport auto-

mobiles in driveaway service[1] between all points in the United States. After numerous consumer complaints, the Commission issued an order in 1976 directing petitioner to cease and desist from certain abusive and unlawful practices.[2] *AAACon Auto Transport—Invest. & Revoc. of Certif.*, 124 M.C.C. 493 (1976). The cease and desist order provided that "upon the willful failure of [petitioner] to comply with any of the provisions of this order, the certificate issued to [petitioner] in No. MC-125808 and subnumbers thereunder, may be suspended or revoked in whole or in part" (124 M.C.C. at 511; see Pet. App. B122). The court of appeals affirmed (*AAACon Auto Transport, Inc.* v. *ICC*, 553 F.2d 93 (2d Cir. 1977) (Table)).

Because the Commission kept receiving consumer complaints, it began a proceeding in February 1978 to determine whether petitioner had violated the cease and desist order and, if so, whether the Commission should suspend or revoke any or all of petitioner's operating authority. In 1979 the Commission received an initial decision from administrative law judge (ALJ) Benice, who, after conducting 16 days of proceedings without taking any evidence into the record (Pet. App. A13, B140), accepted petitioner's "offer of settlement"—a 10-day cessation of operations—over the objection of the Bureau of Investigations and Enforcement (*id.* at B132). The Commission rejected the settlement offer, vacated ALJ Be-

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[1] In such service the carriers provide drivers, for hire, to drive persons' automobiles from one place to another.

[2] The proceeding was instituted pursuant to Section 204(c) of the Interstate Commerce Act (now recodified at 49 U.S.C. 11701(a)), and pursuant to Section 212(a) (recodified at 49 U.S.C. and 10925(b) and (c)).

nice's initial decision, and remanded the proceeding for continued hearings before another ALJ better able to move the proceedings (*id.* at A13, B127-B149).

In February 1983, on an evidentiary record including the testimony of 80 witnesses, 592 evidentiary exhibits, and more than 15,000 pages of transcript, ALJ Sarbacher issued his initial decision recommending permanent revocation of all of petitioner's operating authority for willful violations of every provision of the agency's 1976 cease and desist order. In 1984 the Commission affirmed Judge Sarbacher's decision and revoked all of petitioner's operating authority (Pet. App. B3-B116).

The court of appeals unanimously denied a petition for review (Pet. App. A1-A17). It found that the evidence of petitioner's violation of the 1976 cease and desist order was "overwhelming" (*id.* at A5; see also *id.* at B108-B109) and rejected all of petitioner's claims of procedural error (*id.* at A6-A16).

2. Petitioner seeks review in this Court of the rejection by the court of appeals of claims of procedural infirmities. None of petitioner's arguments is sound. There is no conflict with any decision of this Court or another court of appeals, and there is no reason for further review.

a. The court of appeals held that the Commission properly exercised its discretion, after reversing ALJ Benice's initial decision, to reassign the case to another ALJ better able to handle it efficiently (Pet. App. A11-A13). Petitioner admits that it cannot show a Commission abuse of discretion (Pet. 16).[3]

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[3] The court of appeals, of course, recognized that it would be an abuse of discretion for any agency to reassign ALJs with

Petitioner instead argues that the Commission had no discretion at all to reassign the case unless it first removed ALJ Benice for bias or disqualification under 5 U.S.C. 556(b) (Pet. 7-24). This argument is insubstantial.

This Court has long held that agencies have broad discretion in shaping their procedures (*FCC* v. *Schreiber*, 381 U.S. 279 (1965)) and that a substantial measure of this discretion applies to the assignment of ALJs to hear cases. *Ramspeck* v. *Federal Trial Examiners Conference*, 345 U.S. 128, 139-140 (1953). Moreover, the relevant section of the Interstate Commerce Act, 49 U.S.C. 10305(a), and Section 11 of the Administrative Procedure Act (APA) (recodified at 5 U.S.C. 3105),[4] together authorize the Commission in its sound discretion to reassign a case on administrative remand to another ALJ. In light of these statutes and *Ramspeck*, there can be no doubt that, had the Commission known in advance that

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the intent or effect of interfering with ALJ independence or denying a party a fair hearing (Pet. App. A12). The court expressly found that "Aaacon has not, however, established that this was the ICC's intention or that the switch was in any way prejudicial to Aaacon" (*id.* at A12-A13). The fact that Judge Sarbacher's rulings may have differed from Judge Benice's (see Pet. 16-21) does not establish error, since petitioner was not entitled to a hearing before a particular ALJ.

[4] The Interstate Commerce Act reads in pertinent part: "The Interstate Commerce Commission may delegate to * * * an employee appointed under section 3105 of title 5, a matter * * *. The Commission may change or rescind a delegation under this subsection at any time." 49 U.S.C. 10305(a). The Administrative Procedure Act reads in pertinent part: "Administrative law judges shall be assigned to cases in rotation *so far as practicable.*" 5 U.S.C. 3105 (emphasis added).

ALJ Benice would succumb to petitioner's dilatory tactics,[5] it would have been within its discretion to depart from its rotation and assign the case to another ALJ. *Ramspeck*, 345 U.S. at 139-140. The Commission was equally within its discretion to assign the case to another ALJ on remand, when it discovered the problem in the course of reversing his initial decision.

Section 7(b) of the APA (recodified at 5 U.S.C. 556(b)), in no way detracts from this agency power (see Pet. 13), for it deals with a very different subject. It provides that a party may by affidavit alleging "personal bias or other disqualification" challenge an ALJ's hearing of a case, and it requires the agency in its decision to determine the matter. As the court of appeals observed (Pet. App. A11), that statute does not address the right of an agency to reassign a case on administrative remand for the more efficient conduct of agency business, and the subject that it does address—bias or disqualification of an ALJ—is not at issue in this case.

b. Section 11701(c) of 49 U.S.C., as amended by Section 26(a) of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 818, requires certain proceedings to be "dismissed automatically" unless concluded by the Commission within three years after they are begun. Petitioner contends that Section 11701(c) applies retroactively to require dismissal of this proceeding (Pet. 24-25), which was already well underway when the Motor Carrier Act took effect (Pet.

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[5] Contrary to petitioner's claim (Pet. 11), the Commission specifically pointed to the 16 days of proceedings with "no real evidence" and a "war of attrition" successfully waged by petitioner's counsel as "a monument to dilatory conduct" and as the basis for assigning the case on remand to a new ALJ (Pet. App. B140-B141).

App. A11) but was concluded more than three years later. That argument is both unimportant and wrong.

Almost seven years have passed since enactment of the Motor Carrier Act in July 1980, and no investigations begun before that date are still pending at the Commission. Thus the Act's retroactivity is not an issue of any general importance.

Moreover, as the court of appeals held, there is no reason to think that Congress wanted the three-year limit of 49 U.S.C. 11701(c) to apply retroactively to proceedings that were already well underway when the statute was enacted (Pet. App. A6-A12). The agency, whose consistent interpretation of its own statute is entitled to deference (*Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984)), has specifically determined that Section 11701(c) is not retroactive (*In re Louis J. Amato*, 367 I.C.C. 821, 825 (1983)), and the courts have held that the Motor Carrier Act is not retroactive in general.[6]

The derivation of Section 11701(c) supports the Commission's reading. Section 11701(c) derives directly from the former Section 17(14)(a) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 17(14)(a). That provision, enacted in 1976 (Pub. L. No. 94-210, § 303(b), 90 Stat. 50), was expressly pro-

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[6] *Curtis, Inc.* v. *ICC*, 669 F.2d 648, 651 n.3 (10th Cir. 1982); *Watkins Motor Lines, Inc.* v. *ICC*, 641 F.2d 1183, 1186-1187 (5th Cir. 1981); *Hunt Transportation, Inc.* v. *ICC*, 636 F.2d 190 (8th Cir. 1980) (by implication); *Midwestern Transportation, Inc.* v. *ICC*, 635 F.2d 771 (10th Cir. 1980) (by implication); *Sharron Motor Lines, Inc.* v. *United States*, 633 F.2d 1115 (5th Cir. 1981) (by implication); cf. *Burlington Northern, Inc.* v. *United States*, 679 F.2d 915 (D.C. Cir. 1982) (Staggers Rail Act of 1980 not applied to proceeding pending on Act's effective date).

spective in application. By comparison, it had a companion provision, Section 17(14)(b), enacted simultaneously, that was retroactive and directed the Commission to finish within one year all formal investigations then pending for three years. 49 U.S.C. (1976 ed.) 17(14)(b). When Congress recodified the Interstate Commerce Act in 1978, it replaced Section 17(14)(a) with the new Section 11701(c). See 49 U.S.C. (Supp. II 1978) 11701(c). In the Motor Carrier Act of 1980, Congress applied this Section for the first time to motor carriers but did not include a retroactive companion provision, as it had done in applying the time limit to rail carriers in 1976.[7] Thus the court of appeals correctly attached significance to the absence of any retroactive provision (Pet. App. A7 n.4).[8]

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[7] In a written submission, Chairman Gaskins of the Commission suggested that Congress include in Section 11701(c) a provision much like former Section 17(14)(b). See *Examining Current Conditions in the Trucking Industry and the Possible Necessity for Change in the Manner and Scope of Its Regulations: Hearings on H.R. 6418 Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 96th Cong., 2d Sess. Pt. 3, at 1107, 1110 (1980). Congress's failure to do so hardly supports the inference petitioner would draw (see Pet. 32) that Congress intended Section 11701(c) to be fully retroactive rather than wholly prospective.

[8] The court of appeals was also right in applying *Bradley* v. *School Board*, 416 U.S. 696, 711 (1974), to conclude that a retroactive application of the statute on the facts of this case would be unjust. To terminate the proceedings would imprudently disrupt an administrative process that was well underway when the new statute became law, would needlessly waste private and government resources, and would frustrate the fundamental congressional policy that the Motor Carrier Act be implemented so as to minimize turmoil (Pet. App. A8-

The court's resolution of the Section 11701(c) issue is independently supported by a ground on which the court did not rely. The explicit directive of Section 11701(c) is that a formal investigative proceeding begun *under 49 U.S.C. 11701(a)* be finished in three years or automatically be dismissed. That directive does not apply to revocation of authority for violation of a cease and desist order, because such revocation proceedings are not begun under Section 11701(a). Investigations contemplated by 49 U.S.C. 11701(a) are by definition for violation of "this subtitle." In this case, however, the Commission held a full Section 11701(a) investigation years ago, found violations, and entered a cease and desist order. The questions before the Commission in this proceeding were whether there was a willful violation of the cease and desist order and, if so, whether to revoke petitioner's authority. And 49 U.S.C. 10925(c), which governs license revocations and requires that a proceeding to revoke a license be preceded by a compliance order entered in a 49 U.S.C. 11701 proceeding, names only the initial compliance order proceeding as being subject to 49 U.S.C. 11701. Had Congress intended that the subsequent enforcement action also be governed by that provision, it would have been easy to say so.

c. Petitioner's essentially factual claim (Pet. 35-49) that it did not receive notice that all of its certificates were at risk in the revocation proceeding is groundless, for reasons stated exhaustively by the

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A11). As the court recognized, the Commission could simply begin another enforcement action (*id.* at A10). Petitioner's claim that a renewed proceeding would violate the Double Jeopardy Clause (Pet. 27, 34-35) is wrong because the Clause does not apply in non-criminal proceedings of this sort.

Commission (Pet. App. B61-B73). The original cease and desist order plainly stated that "upon the willful failure of [petitioner] to comply with any of the provisions of this order, the certificate issued to [petitioner] in No. MC-125808 *and subnumbers thereunder*, may be suspended or revoked in whole or in part" (124 M.C.C. at 511 (emphasis added); see Pet. App. B122). The February 1978 notice that commenced the revocation hearing mentioned only the Sub-No. 1 authority because that was the *only* license petitioner held at the time (Pet. App. B62). As the court of appeals correctly noted (*id.* at A15-A16), more expansive grants merely built on the original Sub-No. 1 certificate but did not moot the underlying revocation proceeding. Indeed, the evidence concerning petitioner's illicit activities went to its operations as an overall corporate entity and was never segregated by individual license number. The court of appeals also correctly explained (*id.* at A13-A14) that petitioner certainly had actual notice, once the hearing got underway, that its entire operation, *i.e.*, *all* of its operating authority, was at risk. See *National Steel & Shipbuilding Co.* v. *Director, Office of Workers Compensation Programs*, 616 F.2d 420, 421 (9th Cir. 1980).[9]

d. Petitioner has raised as a question presented the constitutionality of a so-called "gag order." Petitioner, however, has not presented any argument concerning this point in its petition, other than an

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[9] Petitioner's claim that the court of appeals ignored several of its arguments (Pet. 37-40) is groundless. The court discussed the most salient arguments expressly (Pet. App. A13-A16) and considered and rejected all other contentions (*id.* at A5 n.1).

unelaborated repetition of the allegation in its argument about reassignment of the case on administrative remand to another ALJ (Pet. 17), and has thus waived the argument.[10]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

ROBERT S. BURK
General Counsel
Interstate Commerce Commission

APRIL 1987

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[10] In any event, it is insubstantial. For three years after the start of the revocation proceeding in February 1978, petitioner was totally free to contact any witness it wished and conducted extensive discovery. In the spring of 1981, petitioner asked ALJ Sarbacher for permission to take yet more depositions and simultaneously sent copies of its petition to numerous witnesses, requesting that they travel substantial distances on short notice to depositions not yet authorized by the ALJ. The ALJ denied petitioner's request for yet more discovery, scheduled trial, and required that petitioner thereafter obtain either Commission counsel's consent or the ALJ's approval before contacting any witnesses. ICC Case No. MC-C-7287 (Decisions of May 27, 1981, and June 30, 1981). The order was an appropriate prophylactic measure to prevent burdens on third parties. Moreover, as the Commission held, petitioner failed to demonstrate how the order in any way prejudiced it (Pet. App. B59-B60).

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Supreme Court, U.S.
FILED
APR 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

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v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBUS CIRCUIT

REPLY OF THE PETITIONER

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TABLE OF CONTENTS

	PAGE
Table of Cases & Authorities	i
Statutes	i
Brief	1

TABLE OF CASES AND AUTHORITIES

Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128 (1953)	1
Reserve Mining Co. v. Lord, 525 F.2d 1055 (1st Cir. 1981)	2
In Re Ruffalo, 390 U.S. 544 (1968)	7
United States v. Gregory, 369 F.2d 185 (D.C. Cir. 1966)	7

STATUTES

49 U.S. Code Section 11701(a)	9
49 U.S. Code Section 11701(c)	9

Related companies are listed in petitioner's Petition for Ceriorari

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-1322

AAACON AUTO TRANSPORT, INC., Petitioner

v.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA

REPLY MEMORANDUM OF PETITIONER

Petitioner AAACon Auto Transport, Inc. submits this Reply Brief in order to correct four of the errors in the memorandum submitted by respondents. The Commission's Reply Memorandum indicates that on the questions of gag orders and in the removal of a sitting judge, the Commission intends to continue the practices it utilized in the AAACon proceeding. It should not be permitted to do so.

Respondents mischaracterize Ramspeck v. Federal Trial Examiners Conference, 354 U.S.

128 (1953).

That case did not deal with the removal of a sitting administrative law judge against his will during the course of a proceeding. The Ramspeck decision concerned the employment rights of administrative law judges generally, and the Commission's authority to assign them to cases in the first instance. Research shows that this is the first case in which a sitting administrative law judge was removed from a proceeding against his will, without an affidavit or other evidence of wrongdoing being adduced, and where the tribunal did not first afford the judge an opportunity to comport his conduct of the case with the particular wishes of the tribunal. Cf. Reserve Mining v. Lord, 525 F.2d 181 (8th Cir. 1976).

The second error is that the respondents mislead, albeit unintentionally, in stating (Resp. Br. p. 10, no. 10) that for three years,

starting in 1978, petitioner was "totally free to contact any witness it wished and conducted an extensive discovery". That was true with regard to the proceedings conducted before Judge Benice up to 1980. However, after Judge Benice was removed in 1980, and was replaced with Judge Sarbacher, in 1981, the latter prohibited AAACon from contacting or interviewing any witness without his prior consent or that of the prosecuting attorney. Moreover, in the agency proceedings reactivated under Judge Sarbacher, practically all of the witnesses were new and different from those proposed in the 1978 proceeding. Accordingly, to those witnesses, petitioner AAACon Auto Transport, Inc. was allowed neither discovery nor any contact despite its repeated formal and informal requests to Judge Sarbacher therefor.

The agency gag order here on review is a more egregious interference with pretrial preparation by a defendant than that condemned by the D.C. Circuit Court of Appeals in United States v. Gregory, 369 F.2d 185 (D.C. Cir. 1966). In the Gregory case, the Court held that interference by government attorneys with informal investigative activities by counsel for a defendant constituted a denial of a fair trial. In the Gregory case, the prosecuting attorney had stated to witnessess that while they could speak with defense counsel, his advice was that they do so only in his presence. The Court noted that:

> Witnesses, particularly eye witnesses, to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them.

Here the defendant was denied

that opportunity which, not only the statute, but elemental fairness and due process required that he have. It is true that the prosecutor stated he did not instruct the witnesses not to talk to defense counsel. He did admit that he advised the witnesses not to talk to anyone unless he, the prosecutor, were present.

We accept the prosecutor's statement as to his advice to the witnesses as true. But we know of nothing in the law which gives the prosecutor the right to interfere with the preparation of the defense by effectively denying defense counsel access to the witnesses except in his presence. Presumably the prosecutor, in interviewing the witnesses, was unencumbered by the presence of defense counsel, and there seems to be no reason why defense counsel should not have an equal opportunity to determine, through interviews with the witnesses, what they know about the case and what they will testify to. In fact, Canon 39 of the Canons of Professional Ethics makes explicit the propriety of such conduct: "A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or

> criminal action without the consent of opposing counsel or party." Canon 10 of the Code of Trial Conduct of the American College of Trial Lawyers is an almost verbatim provision.
>
> * * *
>
> It is not suggested here that there was any direct suppression of evidence. But there was, unquestionably, a suppression of the means by which the defense could obtain evidence. The defense could not know what the eye witnesses to the events in the suit were to testify to or how firm they were in their testimony unless defense counsel was provided a fair opportunity for interview.
>
> In our judgment the prosecutor's advice to these eye witnesses frustrated that effort and denied appellant a fair trial. Id. at 188, 189.

The reasoning in Gregory, supra, is equally applicable to the quasi-criminal proceeding involving the revocation of AAACon's certificate. In Re Ruffalo, 390 U.S. 544 (1968). The rationale of Gregory applies most

strongly to a ban on any contact or interview by AAACon's counsel with all proposed public witnesses.

Respondents concede that AAACon was denied any opportunity to interview the "eye witnesses." AAACon was denied a fair trial.

The third error in the Commission's reply occurs at pages 2 and 9, where the Commission mistates that the 1976 cease and desist order of the Commission provided notice that all of petitioner's certificates would be subject to revocation in the agency proceeding. What the Commission has quoted is not the 1976 cease and desist order of the Commission (which specifically states only that petitioners Sub. No. 1 certificate might be revoked for furture violations). Rather, the respondents have quoted a 1973 proposed order of a

hearing examiner, the language of which was superseded by the terms of the final order of the Commission in 1976.

Accordingly, petitioner never received notice, in the order commencing the 1978 proceeding, at any time prior to that proceeding or at any time during the course of the proceeding that any of its certificates other than the Sub. No. 1 certificate might be suspended or revoked. The notices and evidence only concerned the Sub. No. 1 certificate. Moreover, the prosecuting attorney's remarks during the proceeding indicated that operations by petitioner under its other certificates were not in issue. The prosecution and the Commission had every opportunity to amend the notice of proceeding (which was limited to possible revocation of the Sub No. 1 certificate). They never did so.

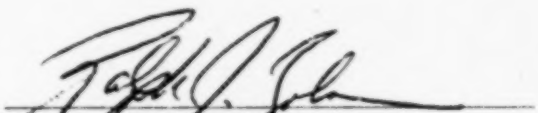
The Commission's argument that the

evidence applied to all of AAACon's operations is incorrect. For example, no evidence concerning petitioner's trucking operations under its Sub 8X certificate was adduced.

Finally, the Commission argues that 49 U.S. Code Section 11701(a) is not applicable to the proceeding conducted by the Commission because the revocation proceeding was not an investigative proceeding thereunder. This is a labored attempt to resurrect an argument rejected by the Court of Appeals below. The question before this Court is whether the time limits of 49 U.S. Code Section 11701(c) are applicable to agency proceedings underway at the time of its enactment. The answer is that the three year automatic cut-off provision was applicable under the established rules of statutory construction, heretofore

discussed. The applicability of the automatic cut-off legislation to on-going proceedings is also supported by the fact that Congress rejected the request of Chairman Gaskins of the Commission for a savings clause to insulate on-going proceedings from the operation of the cut-off rule.

For the foregoing reasons it is respectfully requested that this Court grant the Petition for a Writ of Certiorari.



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